FILE COPY

Office-Supreme Court, U.S.
FILED
APR 8 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 886

THE PORT OF NEW YORK AUTHORITY,
Appellee,

vs.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,
Appellants.

THE PORT OF NEW YORK AUTHORITY,
Appellee,

vs.

ELM LAND CO., INC.,
Appellant.

On Appeal from Final Judgment of the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT AND BRIEF FOR APPELLANTS, ELIZABETH CERVIERI, JOHN A. CERVIERI AND ELM LAND CO., INC.

GROSS AND GROSS,
Attorneys for Appellants,
9 Hudson Street,
Hackensack, New Jersey

NELSON G. GROSS,
Of Counsel.

Argus Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
Opinions of the Court Below	2
Jurisdiction	2
Question Presented by the Appeal	5
Statement of the Case	5
Argument—A state statute providing one party a procedural option to demand a jury while not providing such option to an adverse party is invalid as against the Fourteenth Amendment of the United States Constitution in that it denies equal protection of the laws to said adverse party	7
Appendix A:	
Majority Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)	1a
Appendix B:	
Dissenting Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)	22a
Appendix C:	
Per Curiam Opinion of the Supreme Court of New Jersey (No. A-82, September Term—1960)	29a
Appendix D:	
Mandate on Affirmance of Supreme Court of New Jersey	30a
Appendix E:	
Mandate on Affirmance of Supreme Court of New Jersey	32a

PAGE

Cases Cited

A. Backus and Sons v. Fort Street Union Depot Co., 169 U. S. 557 (1898) 10

Andrews v. Board of Adjustment of the Township of Ocean, 51 N. J. Super. 69, 143 A. 2d 262, 30 N. J. 245, 152 A. 2d 580 (Sup. Ct., 1959) 8

Bogni v. Perotti, 112 N. E. 853 (Sup. Jud. Ct. Mass., 1916) 11

Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902) 10

County of Bergen v. Port of New York Authority, 160 A. 2d 811 (Sup. Ct., 1960) [not yet officially reported] 8

Dohany v. Rogers, 281 U. S. 362, 74 L. Ed. 904 (1930) 11

Hague v. Warren, 142 N. J. Eq. 257, 59 A. 2d 440 (E. & A., 1948) 8

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U. S. 94 (1952) .. 2

National Dairy Products Co. v. Milk Control Board of New Jersey, 133 N. J. L. 491, 44 A. 2d 796 (Sup. Ct., 1945) 8

Port of New York Authority v. Weehawken Tp., 27 N. J. Super. 328, 99 A. 2d 377 (Ch. Div., 1953), reversed for reasons not here pertinent, 14 N. J. 570, 103 A. 2d 662 (1954) 8

Putnam v. Ford, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App. Va., 1930) 11, 12

Republic Pictures Corp. v. Kappler, 151 Fed. 2d 543 (8th Cir. Iowa, 1945), aff'd, 327 U. S. 757, rehearing denied, 327 U. S. 817 .....

Traux v. Corrigan, 257 U. S. 312 (1921) 11

PAGE

United States v. Barnison, 339 U. S. 87; 94 L. Ed. 675 (1950) 12

United States v. Heinze, 218 U. S. 532, 54 L. Ed. 1139 (1910) 11, 12

Washington Nat. Ins. Co. v. Board of Review of New Jersey Unemployment Compensation Commission, 1 N. J. 545, 64 A. 2d 443 (Sup. Ct., 1949) 8

Winters v. People of State of New York, 333 U. S. 507 (1948) 2

United States Constitution Cited

Fourteenth Amendment 2, 3, 7, 8, 10, 13-15

New Jersey Constitution Cited

Article I, Section 1 8

Statutes Cited

Air Terminal Act 6

Eminent Domain Act 6, 7

L. 1947, C. 43, Sec. 15, as amended 5, 7

L. 1956, C. 156 ..... 5, 7

N.J.S.A. 20:1-1 to 36 6

R.S. 20:1-1 et seq. 5, 7

R.S. 20:1-16 7

R.S. 20:1-20 7

R.S. 32:1-4 8

R.S. 32:1-35.15, N.J.S.A. 6, 7

R.S. 32:1-132, N.J.S.A., as amended 3, 5-7

42 Stat. 174 8

28 U. S. C. A.:

Sec. 1257(2) 2

PAGE

Text Cited

12 Am. Jur., "Equality in Legal Proceedings—Civil":
Sec. 543, p. 241 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

THE PORT OF NEW YORK AUTHORITY,

Appellee,

vs.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Appellants.

THE PORT OF NEW YORK AUTHORITY,

Appellee,

vs.

ELM LAND CO., INC.,

Appellant.

JURISDICTIONAL STATEMENT AND BRIEF FOR APPELLANTS, ELIZABETH CERVIERI, JOHN A. CERVIERI AND ELM LAND CO., INC.

Opinions of the Court Below

The majority and dissenting opinions of the New Jersey Supreme Court affirming the judgment of the New Jersey Superior Court, Law Division, are reported in 34 N. J. 144, 167 A. 2d 609 (1961). Both opinions are appended hereto.

Jurisdiction

This is an appeal brought pursuant to 28 U. S. C. A. 1257(2) which permits an appeal from a final judgment rendered by the highest court of the state in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There are two cases involved in this appeal, both being taken from the Supreme Court of the State of New Jersey. They involve identical or closely related questions and, therefore, are being outlined herein in a single jurisdictional statement and brief.

The date of judgment and entry thereof in both of the within cases was January 23, 1961, and for each case a notice of appeal was filed with the Supreme Court of New Jersey on February 24, 1961.

It appears settled that a judgment of the highest court of a state against the contention of a party that a particular state statute violated the Fourteenth Amendment of the United States Constitution would entitle that party to an appeal as to the constitutional issue on its merits in accordance with said statutory provision. *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94 (1952). To the same effect is *Winters* v. *People of State of New York*, 333 U. S. 507 (1948).

The particular statute of the State of New Jersey which has in these two cases been held valid as against both appellants' contention that it is repugnant to the Fourteenth Amendment of the United States Constitution is herein set forth from N.J.S.A. 32:1-132:

> "32:1-132. Determination by Port Authority that real property is required for public use; condemnation.
>
> "If for any of the purposes of this act (including temporary construction purposes, and the making of additions or improvements to bridges or tunnels already constructed), the Port Authority shall find it necessary or convenient to acquire any real property as herein defined, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination, the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority; and with the exceptions hereinafter specifically noted, the said determination shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use; but the public use in the hands or under the control of the Port Authority shall be deemed superior to the public use in the hands of any other person, association or corporation.
>
> "The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple absolute or a lesser interest by condemnation or the exercise of the right of eminent domain under and pursuant to the provisions of the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jer-

sey, Title 20:1-1 et seq., in the case of property located in such State, or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, and as provided in section 15 of chapter 802 of the laws of New York, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, or pursuant to such other and alternate procedure as may be provided by law.

"Where a person entitled to an award in the proceedings to condemn any real property for any of the purposes of this act, remains in possession of such property after the time of vesting of title in the Port Authority, the reasonable value of his use and occupancy of such property subsequent to such time, as fixed by agreement or by the court in such proceedings or by any court of competent jurisdiction, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the Port Authority.

"Nothing herein contained shall be construed to prohibit the Port Authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary, or from acquiring any such property by negotiation or purchase. As amended L. 1956, c. 156, p. 632, sec. 5."

It is the foregoing statute which has been questioned and which is the subject of these cases. And more particularly it is that paragraph relating to procedure wherein the Port Authority, plaintiff appellee herein, is given the option to

proceed either by way of the Revised Statutes of New Jersey, Title 20:1-1 *et seq.* (which permits jury demand by condemning authority or land owner), or by Section 15 of Chapter 43 of the laws of New Jersey, 1947, as amended (which does not permit a jury demand on the part of the land owner).

Question Presented by the Appeal

Whether a state statute providing one party a procedural option to demand a jury while not providing such option to an adverse party is contrary to the United States Constitution in that it denies equal protection of the laws to said adverse party?

Statement of the Case

These proceedings were instituted by plaintiff-appellee, The Port of New York Authority, under *N.J.S.A.* 32:1-132 as amended *L.* 1956, c. 156, to condemn certain lands of defendants, Elizabeth M. and John A. Cervieri, husband and wife, and Elm Land Co., Inc. (as well as lands of other persons) for use in connection with its undertaking to add an additional deck to the interstate George Washington Bridge. Defendants' demand for a jury trial on the issue of compensation to be awarded for the taking was denied on the ground that under the statute referred to the method of procedure being pursued by the Authority did not provide for trial by jury. After damages had been awarded by the Law Division of the Superior Court, the Cervieris and Elm Land Co., Inc. appealed to the Appellate Division from part of the judgment, contending primarily that the option granted by the Legislature to the Authority of selecting one of two alternative procedures in condemning their property deprived them of equal protection of the law in violation of the state and federal constitutions. Before argument there the matter was certified on motion of the New Jersey Supreme Court, for its disposition.

The action to condemn defendants-appellants' property for the purpose indicated was instituted on July 28, 1958. The complaint recited that the Authority elected "pursuant to the option accorded to it" by *N.J.S.A.* 32:1-132 to proceed under the air terminal act, *N.J.S.A.* 32:1-35.15 and not under the general eminent domain act, *N.J.S.A.* 20:1-1 to 36. Immediate fee simple title and possession were demanded. An order to show cause why the relief prayed for should not be granted, returnable September 5, 1958, was issued by the Superior Court, Law Division, and served upon the various parties involved. On the return day, the Cervieris appeared without counsel and an order was entered awarding title of the several properties described in the complaint to the plaintiff, making provision for possession thereof and directing plaintiff to bring on "a hearing to have this Court either (a) determine without a jury after view of said property the compensation which should justly be made to the owner or respective owners thereof and thereafter enter a judgment in the amount so determined, or (b) in the alternative to have this Court appoint three advisory commissioners to view said real property and to advise on or before a date to be specified by the Court of the damages, if any, which should be assessed for the taking of said real property."

Pursuant to notice of motion the appellant moved to dismiss Counts 3 and 7 of the complaint on the ground that R.S. 32:1-132, as amended 1956, upon which the complaint is based, is unconstitutional. These motions were denied by the trial court. Note that the motion had been argued in connection with Count 10 and then repeated for the record on the trial of Counts 3 and 7.

Both cases were then heard, damages awarded and an appeal was taken from a final judgment of the Superior Court of New Jersey, Law Division, entered May 25, 1960,

which on Count 7 of the complaint in condemnation filed in the above entitled cause by The Port of New York Authority awards to Elizabeth M. Cervieri, the appellant, the sum of $7,100.00 and on Count 3 to said appellant the sum of $1,412.00; and an appeal was taken from a final judgment of the Superior Court of New Jersey, Law Division, entered July 6, 1960, which awards the appellant, Elm Land Co., Inc., $1,000.00 on Count 3 and $500.00 on Count 4.

The appeals were to the Appellate Division of the Superior Court of New Jersey, but, as above stated, the Supreme Court of the State of New Jersey certified both matters and judgment affirming the Law Division judgments in both cases was entered on January 23, 1961.

ARGUMENT

A state statute providing one party a procedural option to demand a jury while not providing such option to an adverse party is invalid as against the Fourteenth Amendment of the United States Constitution in that it denies equal protection of the laws to said adverse party.

New Jersey R.S. 32:1-132, as amended L. 1956, c. 156, grants to The Port of New York Authority in condemnation cases relating to additions or improvements to the George Washington Bridge an option to proceed either by way of Section 15 of Chapter 43 of the Laws of New Jersey, 1947, R.S. 32:1-35.15 (the Airport Act), or by way of R.S. 20:1-1 *et seq.* (the Eminent Domain Act). The former provision requires an assessment of compensation without a jury while the latter permits a demand for a struck jury to be filed on appeal from the Commissioners' award. R.S. 20:1-16, 20. This procedural advantage is not available to the condemnees.

Defendant-appellee, The Port of New York Authority, is a body corporate and politic created by a compact between the States of New Jersey and New York (R.S. 32:1-4) with the consent of the Congress of the United States (42 Stat. 174). It is an agency of both states to further their common interests within the jurisdiction committed to it. *Port of New York Authority* v. *Weehawken Tp.*, 27 N. J. Super. 328, 353, 99 A. 2d 377 (Ch. Div. 1953), reversed for reasons not here pertinent 14 N. J. 570, 575, 103 A. 2d 603 (1954); *County of Bergen* v. *Port of New York Authority*, 160 A. 2d 811 (Sup. Ct. 1960) [not yet officially reported].

Equal protection under the laws is granted by Article I, Section 1 of the New Jersey Constitution and by the Fourteenth Amendment of the United States Constitution. The constitutional guarantee of due process of law guarantees equality in the determination of the rights of those affected and protects the individual against arbitrary action. *Hague* v. *Warren*, 142 N. J. Eq. 257, 59 A. 2d 440 (E. & A. 1948); *National Dairy Products Co.* v. *Milk Control Board of New Jersey*, 133 N.J. L. 491, 44 A. 2d 796 (Sup. Ct., 1945).

This equality of due process and the requirement of equal protection of the laws forbids arbitrary discrimination against one party and favoring another in like circumstances. Distinctions can only be made where there is a rational basis therefor. *Washington Nat. Ins. Co.* v. *Board of Review of New Jersey Unemployment Compensation Commission*, 1 N. J. 545, 64 A. 2d 443 (Sup. Ct. 1949).

In the instant case a classification is made without any basis in fact. An option is granted to one party but denied to another where there can be no reasonable basis for such distinction as the circumstances are alike. The rights of all persons must rest on the same rule under similar circumstances. *Andrews* v. *Board of Adjustment of the Township of Ocean*, 31 N. J. Super. 69, 143 A. 2d 262, 30 N. J. 245, 152 A. 2d 580 (Sup. Ct. 1959).

In 12 Am. Jur. 241, Section 543, *Equality in Legal Proceedings—Civil*, the following language is found:

> "Generally speaking, equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also would be applied to any other person in the state under similar circumstances and conditions.
>
> "Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws."

In *Republic Pictures Corp. v. Kappler*, 151 Fed. 2d 543, 547 (8th Cir., Iowa 1945), aff'd 327 U. S. 757, rehearing denied 327 U. S. 817, where the state act had procedurally prescribed a shorter statute of limitations for rights arising under federal law and had thereby discriminated against such claims "• • • solely because it arises under a federal statute", the court stated that:

> "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may

appeal to the courts for relief under like conditions and without discrimination."

Specifically relating to procedure in a condemnation action is *J. Backus and Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 571 (1898), where the applicable statute had changed the procedure to make appropriate a common law jury rather than the original jury of inquest. The Supreme Court held that such change could not be attacked but in discussing the problem stated that

> "An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

So that the suggestion was that if one party could choose one kind of jury while the adverse party could choose only another kind of jury or had an option as to procedure, the legislation providing for such uneven, arbitrary and discriminatory procedure would be unconstitutional. And this of course would not be altered merely because one party was the condemning authority and the other party the property owner, as any distinction on that ground could not possibly be based upon material and substantial distinctions reasonably related to the subject matter of the legislation or considerations of policy.

As has been stated many times with respect to both the Fourteenth Amendment to the United States Constitution and the equal protection clauses of state constitutions, legislation must be declared unconstitutional where a classification is not based on reasonable ground and "arbitrary selection can never be justified by calling it classification." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560 (1902). Without doubt this language is also appropriate

where the statute involved creates a classification which makes dissimilar the procedural rights of different parties. See *Bogni* v. *Perotti*, 112 N. E. 853 (Sup. Jud. Ct. Mass. 1916), where a statute was held unconstitutional since it permitted one class to resort to injunctive relief and not another. To the same effect is *Traux* v. *Corrigan*, 257 U. S. 312 (1921).

The Port Authority has in its brief filed in the State court cited *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930), and the majority opinion of the New Jersey Supreme Court has relied thereon. It was held there that legislation could provide a different condemnation procedure for the State itself than for a private corporation with condemnation authority. The issue, however, had nothing whatever to do with that which is involved herein; since the party adverse to the condemning authority in that case did not have any lesser privilege or procedural remedy than did the State or private condemning authority.

Also relied upon by the Port Authority previously has been *Putnam* v. *Ford*, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App., Virginia, 1930). There the State Tax Commissioner was given the right to a rehearing but not so the land owner. However, it was said that legislation could not arbitrarily classify; it being necessary that any classification rest on a ground of difference having relation to the object of the legislation so that all parties be treated alike. It was held in that action that a rationally sound classification existed since the original hearing required constructive notice only to the state tax commissioner and the rehearing was necessary to that party so as to ensure the opportunity for an appearance.

Also cited previously by the Port Authority is *United States* v. *Illinois*, 218 U. S. 532, 54 L. Ed. 1139 (1910), it being stated that said case was the basis for the decision in

the *Putnam* case mentioned in the foregoing paragraph. In *United States v. Heinze* the court wrote that:

> "The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances shall be treated alike."

It happened that the question in the *Heinze* case involved the right of the United States to appeal from a judgment sustaining a motion to quash. Of course it was a criminal case, the factual material entirely different, the policy wholly unlike that here, and certainly a basis in fact existed for the classification permitting the government a right to appeal at that point.

United States v. Burnison, 339 U. S. 87, 94 L. Ed. 675 (1950), is another case relied upon by the Port Authority in its previous briefs. A classification was made by statute but the court held "* * * it is justified by reason of the state's close relationship with its residents and their property." The issue concerned the permissibility of testamentary gifts to the State of California, but not to the United States. Again the facts are not similar to those herein and no question was there raised nor was it raised in any of the cases as to the principle that no arbitrary classification could be established by statute.

The majority opinion of the New Jersey Supreme Court delivered by Justice Francis argues that so long as each procedure provided to the Port Authority in and of itself satisfies the demands of equal protection, that both to-

gether as a unit must necessarily satisfy the requirement of equal protection embodied in the Fourteenth Amendment to the United States Constitution. This appears after analysis to be a wholly specious argument. It cannot and does not ever follow that merely because two or more ingredients are proper, that joined together their unity will be satisfactory. Clearly the Port Authority is enabled to utilize either one of the two procedures while the land owner is left to the mercy of the choice. The Port Authority is fortified by both methods and the fact each one alone is not unconstitutional cannot mean that both together, while the land owner has neither, satisfy the demands of equal protection.

The majority of the Supreme Court of New Jersey seems to sense the fallaciousness of its argument since further in its opinion it states:

> "* * * If there were inequality within the framework of either procedure, for example, if the Authority were given and the property-owner were denied a right of appeal, *In re City of Rochester* 224 N. Y. 386, 121 N. E. 102 (1918); *State* v. *Wisconsin-Minnesota Light and Power Co.*, 165 Wis. 430, 162 N. W. 433 (1917), or the right to introduce evidence of comparable sales, or offers to sell or purchase, *Georgia Power Co.* v. *Brooks*, 207 Ga. 406, 62 S. E. 2d 183 (1950), in one mode of procedure which the condemnor had the option to select and did select in the particular case, a deprivation of equal protection of law would exist. * * *"

Those words indicate cogently that if the Port Authority was given an option to choose two alternative modes of procedure and the property owner was not there would as a result be inequality within the framework of the statute.

It would seem only logical to look at the statute as a whole rather than to dismember into units; and upon so doing, the foregoing comment of the court undermines the logic of its conclusion.

As Justice Proctor has written in his dissenting opinion, joined in by Justice Schettino, no case has been cited by the majority to support the conclusion of the court, which result completely subordinates the right of equal protection under the laws to the due process clause in the Fourteenth Amendment. These are two separate and distinct rights and equal protection is certainly entitled to as much preservation as is due process.

Realizing probably that proper individual components do not make a proper whole, the majority feels it necessary to find a basis for the unequal classification. This is apparent when it says that:

> "The principle of common application is that if there be any reasonably conceivable basis for the separate treatment the legislation will not be voided."

However, the reasonable basis cannot be found. The fact that the classification is blatantly arbitrary is and can be the only conclusion. If, as the majority says, "greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen", then the Port Authority should not have been given a choice, but should have been given recourse only to trial by judge. On the other hand, if in some instances a jury would be preferable, then the land owner should have an equal opportunity to make that determination.

The Port Authority itself has said in its brief and admitted throughout in oral argument before the Supreme Court that there is no basis or standard set out for a rational exercise of the option between jury trial or trial by judge

(see plaintiff's brief for the State court at page 18, line 3 and at page 25, line 37). This is clear acknowledgment that there is no standard for the exercise of the option; and therefore necessarily requires the conclusion that the classification is none other than arbitrary. The Port Authority dismisses this lack of standard by saying that procedural rights are not fundamental. The appellant here says that where procedural rights create unequal positions then indeed nothing could be more fundamental. Equal protection is a distinct and, of course, a fundamental constitutional guarantee.

The appellant here agrees with the reasoning of the dissenting opinion. It argues that a unilateral right to trial by jury must be invalid as against the Fourteenth Amendment. The subject statute, which grants said unilateral right, necessarily creates an arbitrary discrimination and denial of equal protection under the laws. The question presented here would therefore be so substantial as to require plenary consideration by the Supreme Court of the United States.

GROSS AND GROSS,
Attorneys for Appellants.

NELSON G. GROSS,
Of Counsel.

[APPENDICES FOLLOW]

Appendix A

Majority Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)

(Filed—January 23, 1961.)

SUPREME COURT OF NEW JERSEY

(No. A-44, September Term—1960)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE E. HEMING, JR., *et al.*,

Defendants,

and

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Defendants-Appellants.

Argued November 9, 1960. Decided January 23, 1961.

MR. RUSSELL E. WATSON argued the cause for plaintiff-respondent, The Port of New York Authority.

(MR. ROBERT S. TOBIN, of counsel.)

MR. NELSON G. GROSS argued the cause for defendants-appellants, Elizabeth M. Cervieri and John A. Cervieri. (MESSRS. GROSS AND GROSS, attorneys.)

Appendix A

The opinion of the Court was delivered by

FRANCIS, J.

These proceedings were instituted by plaintiff, The Port of New York Authority, under *N.J.S.A.* 32:1-132 as amended *L.* 1956, c. 156, to condemn certain lands of defendants, Elizabeth M. and John A. Cervieri, husband and wife, (as well as lands of other persons) for use in connection with its undertaking to add an additional deck to the interstate George Washington Bridge. Defendants' demand for a jury trial on the issue of compensation to be awarded for the taking was denied on the ground that under the statute referred to the method of procedure being pursued by the Authority did not provide for trial by jury. After damages had been awarded by the Law Division of the Superior Court, the Cervieris appealed to the Appellate Division from part of the judgment, contending primarily that the option granted by the Legislature to the Authority of selecting one of two alternative procedures in condemning their property deprived them of equal protection of the law in violation of the state and federal constitutions. Before argument there the matter was certified on our own motion for disposition by this Court.

The action to condemn defendants' property for the purpose indicated was instituted on July 28, 1958. The complaint recited that the Authority elected "pursuant to the option accorded to it" by *N.J.S.A.* 32:1-132 to proceed under the air terminal act, *N.J.S.A.* 32:1-35.15 and not under the general eminent domain act, *N.J.S.A.* 20:1-1 to 36. Immediate fee simple title and possession were demanded. An order to show cause why the relief prayed for should not be granted, returnable September 5, 1958, was issued by the Superior Court, Law Division, and served upon the various parties involved. On the return day, the

Cervieris appeared without counsel and an order was entered awarding title of the several properties described in the complaint to the plaintiff, making provision for possession thereof and directing plaintiff to bring on "a hearing to have this Court either (a) determine *without a jury* after view of said property the compensation which should justly be made to the owner or respective owners thereof and thereafter enter a judgment in the amount so determined, or (b) in the alternative to have this Court appoint three advisory commissioners to view said real property and to advise on or before a date to be specified by the Court of the damages, if any, which should be assessed for the taking of said real property." (Emphasis added.)

Some time prior to the hearing to fix the damages these defendants served and filed a notice that they would apply at the hearing for a trial by jury. The motion was made and denied because the Authority had elected to condemn in accordance with the procedure prescribed by the airport terminal law which gave neither party to the action a right to trial by jury. The matter was then heard, damages were awarded, and this appeal followed.

The Authority has moved to dismiss the appeal, contending that the demand for jury trial and the attack upon the constitutionality of the election bestowed upon it with respect thereto, should have been made immediately after the service of the complaint and order to show cause upon the defendants. The claim is that since title and possession had vested in it within six weeks after defendants were served, their jury demand about a year and a half later came too late. But defendants disclaim any effort or intention to interfere with the transfer of title or possession. The request for a jury was pertinent only to the issue of damages and was made only as to that aspect of the case. Furthermore, reversal of the judgment would not divest

the title. *N.J.S.A.* 32:1-35.15(*l*). Under the circumstances lapse of time does not foreclose consideration of the problem. Accordingly, the motion to dismiss is denied.

Study of the merits of the appeal requires reference to various clauses of the Constitutions and to a number of informative statutes.

Acquisition of property for public use by the state, county, municipality, or a public agency is generally controlled by the eminent domain act, *N.J.S.A.* 20:1-1 to 36. But for a few changes that act traces back substantially in its present from to *L.* 1900, c. 53. When property is desired for public use and the parties cannot agree upon the price, the value is required to be ascertained in the manner directed thereby "except as otherwise provided by law". *N.J.S.A.* 20:1-1. Provision is made for the appointment by the Superior Court of three commissioners to fix the compensation to be paid. When they have done so in the manner prescribed and filed their report with the court, either the public body or the land owner may appeal therefrom. *N.J.S.A.* 20:1-2 to 16. Such appeal must be tried in the Superior Court "by a jury upon the demand of any party" thereto. *N.J.S.A.* 20:1-20. After the advent of the 1947 Constitution this Court in 1953 implemented the general act through its Rules of Civil Practice. *R.R.* 4:92-1 to 13. Provision was made for jury trial on appeal from the award of commissioners on demand of any party. *R.R.* 4:92-6.

The Port of New York Authority is a public corporate entity, an arm of the States of New York and New Jersey, created in 1921 by compact between them for the purpose of coordination and development of the terminal, transportation and other facilities of commerce in, about and through the port of New York. *N.J.S.A.* 32:1-1. It was given the power of condemnation by *N.J.S.A.* 32:1-33, and by *N.J.S.A.* 20:1-1 to 33 a legislative mandate was im-

posed to exercise the power according to the procedure prescribed by the eminent domain act, *supra*. Moreover, by specific reference the same procedure was made applicable to property to be condemned for the Bayonne Bridge, the Outerbridge Crossing, and construction of the Goethals Bridge. *L.* 1925, c. 95, *N.J.S.A.* 32:1-100; *L.* 1925, c. 193, *N.J.S.A.* 32:1-47; *L.* 1925, c. 195, *N.J.S.A.* 32:1-59. In addition, and more pertinent to the present case, construction of the George Washington Bridge was authorized by *L.* 1925, c. 41, *N.J.S.A.* 32:1-71. Section 7 of the act also required any condemnation proceedings necessary to the accomplishment of that end to be brought under the eminent domain act.

Chapter 4, *L.* 1931, among other things legislated with regard to the acquisition by condemnation of any real property that might be necessary for the construction of bridges or tunnels or for the making of additions or improvements to bridges or tunnels already in existence. *Section* 15; *N.J.S.A.* 32:1-132. Authorization was given to secure such property by use of the eminent domain act.

In 1947 the Authority was empowered to acquire property by condemnation for air terminal purposes. *L.* 1947, c. 43, *N.J.S.A.* 32:1-35.15. The act provides its own procedure to be employed in so doing. Upon the filing in the Superior Court of a complaint seeking condemnation and after compliance with certain formalities as to notice, and the like, an application must be made to the appropriate judge to fix a date for hearing on the compensation to be paid. The matter is then heard by a judge who shall determine "without a jury and with or without a view of the property" the issue of valuation. *N.J.S.A.* 32:1-35.15(*i*). He may appoint three commissioners to view the lands and "advise" him what damages, if any, shall be awarded. If appointed:

> "The commissioners shall proceed under such directions and rules as shall from time to time be fixed by the said judge to view the lands, to hear such evidence as they may desire, and to fix ~~such sum~~, if any, that in their judgment will represent the fair value of the lands so taken. * * *." *N.J.S.A.* 32:1-35.17*a*.

The judge is not bound by the commissioners' findings. He may review them and alter or reject them in such manner as will fairly protect the interests of the parties, and his "review may be made either with or without further hearing." *Ibid.* After the judge has ascertained the compensation to be paid, judgment in that amount is to be entered. Any party aggrieved by the judgment "may appeal". *Sections* 15*f-l*, as amended *L.* 1953, c. 31, *N.J.S.A.* 32:1-35.15*f-l*. Such an appeal would be heard in the Appellate Division.

Section 15 of the 1931 act, *N.J.S.A.* 32:1-132, relating as has been indicated above, to the construction of and to the making of additions or improvements to existing bridges and tunnels, and the acquisition of any necessary land therefor by means of the procedure established by the eminent domain act, was amended by *L.* 1956, c. 156. The amendment is the cause of the present controversy. It did not repeal the direction to proceed in condemnation under the eminent domain act but it granted to the Authority the "option" to pursue that statute or the procedure created by the air terminal act, *supra*. More specifically, the amendment authorized the Authority to condemn pursuant to "Revised Statutes of New Jersey, Title 20:1-1 *et seq.* in the case of property located in [New Jersey], or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended for the condemnation of real property for air terminal purposes * * *." *N.J.S.A.* 32:1-132.

Appendix A

As the result of the 1956 amendment, therefore, the Legislature, presumably having in mind the provision of *Section* 1 of the eminent domain act, *N.J.S.A.* 20:1-1, that it shall control the exercise of the power of eminent domain "except as otherwise provided by law", made available two procedural mechanisms for condemnation cases. Thus, if the Authority decided to proceed under the eminent domain act commissioners would be appointed to value the property. If the parties were satisfied with the award, that would end the matter. If, however, either was dissatisfied, an appeal to the Law Division of the Superior Court could be taken and a trial de novo had with or without a jury, at the option of either party. Or if the Authority elected to proceed under the airport terminal act, the matter could be heard expeditiously by the Law Division (with or without preliminary appointment of advisory commissioners) and any damages arising from the taking ascertained. When the latter course is followed, neither party can demand trial by jury. In the present instance, the Authority having chosen to take defendants' land under the air terminal act, trial by jury of the issue of damages was not open to either litigant.

The first question to engage our attention arises from defendants' contention that the option clause of the 1956 amendment of *Section* 15 transgresses *Article* IV, *Section* 7, paragraph 5, of the New Jersey Constitution because it incorporates therein by reference only the condemnation procedure formula of the air terminal act. The claim is that since the Constitution provides that "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act", the failure to set out the pertinent sections of the air termi

nal act at length in the amendment invalidates it. The law has long been settled to the contrary with respect to enactments like this one. A statute which incorporates a prior act by reference in order to create some substantive right or duty offends against the Article. But one which adopts by reference only the method of procedure necessary to effectuate its purposes is not prohibited. *Anthony* v. *Rea*, 22 N. J. Super. 452, 456 (App. Div. 1952); *Jersey City* v. *Martin*, 127 N. J. L. 18, 23 (E. & A. 1940); *Hatches* v. *Hoboken*, 82 N. J. L. 140, 142 (Sup. Ct. 1911); *Campbell* v. *Board of Pharmacy of New Jersey*, 45 N. J. L. 241, 244-45 (Sup. Ct. 1883), *aff'd* 47 N. J. L. 347 (E. & A. 1885); 6 *Nichols, Eminent Domain*, 24.2[1], p. 21 (3d Ed. 1953); 1 *Sutherland, Statutory Construction*, 1925 (3d Ed. 1943).

The crucial issue is projected by defendants' assertion that the option clause of the 1956 amendment deprives them of equal protection of the law in violation of the *14th Amendment* of the United States Constitution and *Article* I, paragraph 1, of the New Jersey Constitution. More particularly, they point out that under the eminent domain act if either they or the Authority are dissatisfied with an award of commissioners, the party dissatisfied is entitled, upon making of such an election, to appeal to the Law Division and to have the damages "determined by a jury". But since the 1956 amendment confers on the Authority the right to proceed under either the eminent domain act or the airport terminal act, and thus to eliminate the possibility of appeal to the Law Division and trial by jury for itself and the property owner, they insist that they are subjected to unfair discrimination. They do not say that the procedure itself for the ascertainment of just compensation for the land taken as prescribed by either act standing alone denies due process, *i.e.*, notice and fair hearing. And they recognize that there is no constitutional

Appendix A

right to trial by jury in condemnation cases. 1 *Nichols, op. cit. supra*, 4.105[1]; 1 *Orgel, Valuation Under Eminent Domain*, 54 (2d Ed. 1953); 18 *Am. Jur. Eminent Domain*, §337, p. 979.

The right of eminent domain is an offspring of political necessity and is an integral facet of sovereignty. *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270 (1897); *Raun v. Housing Authority at Newark*, 125 N. J. L. 25 (Sup. Ct. 1940). Since the power of the State or of any agency created to perform some of its governmental functions to take property for public use is such a basic one, every man must be considered as holding his land subject to its exercise. *Todd v. Austin*, 34 Conn. 78 (1867). No one can complain of injustice arising out of use of it against him so long as it is lawfully employed within existing constitutional limitations. *Jahr*, Eminent Domain 3 (1951); 1 *Nichols, op. cit. supra*, 1.11[2]. An important qualification appearing in the New Jersey Constitution, *Article* 1, paragraph 20, and *Article* 4, *Section* 6, paragraph 3, as well as in the organic charter of most states, is that no private property may be taken for public use without just compensation.

In the absence of any constitutional mandate to the contrary, establishment and regulation of the manner and method of exercising the power of eminent domain has long been recognized as a prerogative of the Legislature, subject only to the due process clauses of the federal and local constitutions. *Crane v. Hahlo*, 258 U. S. 142, 66 L. Ed. 511 (1922); *A. Backus, Jr. & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853 (1898); *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015 (1883); *Morris Mon Realty Corp. v. Board, etc. County of Monmouth*, 18 N. J. 269, 275 (1955); *Marin Municipal Water Dist. v. North Coast Realty Co.*, 178 Cal. 308, 173 Pac. 469 (1918); *Jahr, op. cit. supra*, 185; 18 *Am. Jur. Eminent Domain*,

§308. The legislative discretion as to the procedure to be followed within that framework is very broad. *Secombe v. Milwaukee & St. Paul Ry.*, 90 U. S. 67, 23 Wall. 108 (1874). No particular form or mode of action is required. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made, on notice, as to the amount of compensation to be paid for the property taken, and when that has been provided the command of due process has been met. *A. Backus, Jr. & Sons v. Fort Street Union Depot Co., supra*, at 569; *State v. Fisher*, 54 N. J. Super. 274, 281 (App. Div. 1959); *Ryan v. Housing Authority of Newark, supra* at 341-42; *Jahr, op. cit. supra*, 185. And where that appears the courts properly defer to the legislative will. *Morris May Realty Corp. v. Board, etc., County of Monmouth, supra.* There is practically universal agreement that trial by jury is not necessary. 1 *Nichols, op. cit. supra*, 4.105; 1 *Orgel, op. cit. supra*, 54; 18 *Am. Jur., Eminent Domain*, §337, p. 979. The proceeding for ascertainment of compensation as a condition to the taking may be prosecuted before commissioners, or special boards, or the courts, with or without the intervention of a jury, as the Legislature may designate. Due process is satisfied if it is conducted in some fair and just manner, with opportunity to the owner of the property to present evidence and to be heard thereon. *Dohany v. Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930); *Crane v. Hahlo, supra* at 147; *United States v. Jones, supra* at 519; *Sawyer Lumber Co. v. North Carolina Park Commission*, 30 F. 2d 121 (W. D. N. C., Three Judge Ct. 1929), *app. dis.* 280 U. S. 615, 74 L. Ed. 656 (1929); *Morris v. Comptroller*, 54 N. J. L. 268, 272 (Sup. Ct. 1892). Moreover, there is no vested right in any statutory *modus operandi*. The United States Supreme Court has said that "each succeeding legislature may establish a different one,

providing only that in each is preserved the essential elements of protection." *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, *supra* at 570.

These general observations bring us within range of the specific problem presented. May the Legislature establish alternative procedures for condemnation either of which may be resorted to at the election of the State or one of its public entities? We have no doubt that it may be done constitutionally provided each procedure in and of itself satisfies the demands of due process and equal protection.

Methods of determining the damages to be paid are numerous throughout the country. General, special and alternate procedures abound in the various states. *Jahr, op. cit. supra*, 186; 6 *Nichols, op. cit. supra*, §24.1; 29 C. J. S. *Eminent Domain*, §214*d*. As Orgel said: "The mode of procedure in condemnation cases in the United States is wholly a creature of statute and the legislatures have not been sparing of their progeny." 1 *Orgel, op. cit. supra*, 8. On the national scene until the adoption of Rule 71A of the Rules of Civil Procedure in 1951, the federal courts were required to conform to state practice in eminent domain actions. 7 *Moore's Federal Practice*, §71a.03 (2d ed. 1955). Divergent practices among the states and within the same state led the Federal Advisory Committee on rules to the belief that uniform procedure in the federal system was desirable. In the general statement accompanying the 1948 draft of Rule 71A it was suggested that as far back as 1931 in the various states there were 269 different methods of judicial procedure in various classes of condemnation cases and 56 methods of non-judicial or administrative procedure. *Moore, op. cit. supra*, at 2739. In *Clinton School District* v. *Starr Commonwealth For Boys*, 322 Mich. 105, 33 N. W. 2d 805, 809 (1948), the Supreme Court of Michigan, speaking on the subject of multiple and optional procedures, said:

Appendix A

"In the report of the Judicial Council of Michigan, January 1931, a careful study was made of seventeen different methods provided for by which various State agencies could exercise the right of eminent domain. Some of the methods apply only to certain agencies, while others apply to many agencies. Criticism has frequently been leveled at this system because of the confusion which it causes, but the recommendation of the Judicial Council of a single method was never submitted as a Constitutional amendment. Alternative methods are still left open to certain public agencies. That pursued by plaintiff is proper and is not in any way affected by the fact that plaintiff might have pursued a different method."

Out of the Federal Committee study came Rule 71A. Although substantial uniformity for condemnation actions was achieved thereby, certain qualifications were added. In short, under Rule 71A(*k*) if Congress has created or creates any special tribunal to hear certain cases arising out of the exercise of the federal power of eminent domain, that procedure must be followed. Otherwise any party may have a jury trial on demand, unless the trial court in its discretion orders that "because of the character, location, or quality or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." *Federal Rules of Civil Procedure* 71A. Nichols notes that Congress has specially constituted a tribunal for trial of such cases in instances of expropriation by the Tennessee Valley Authority Act and in the District of Columbia. 6 *Nichols, op. cit. supra*, p. 334.

The Tennessee Valley Authority Act does not grant trial by jury. 16 *U.S.C.A.* 831*v*. The procedure established,

i.e., original determination of compensation by commissioners, and review in the District Court without a jury, is constitutional. *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95 (6th Cir. 1939), *cert. den. United States* v. *Welch*, 309 U. S. 688, 84 L. Ed. 1030 (1940). The *modus operandi* was said to be appropriate to the nature of the case and in "no way contrary to the Fifth Amendment." The Circuit Court of Appeals declared that: "[T]he State may also, when providing for its own needs under the right of eminent domain and taking for such purpose the property of individuals, give all necessary protection to its agents and relegate the owner to such remedy as it deems proper, provided it is adequate and accords to the citizen due process, and without any reference to the Seventh Amendment." 108 *F. 2d* 99; and see *United States* v. *Puryear*, 105 F. Supp. 534 (W. D. Ky. 1952).

When alternative methods of condemnation are prescribed by the Legislature, in one of which either party at some stage of the action may obtain a jury trial, and in the other neither has such trial, and the "option" to select the course to be followed is expressly given to the public agency, the instinctive first reaction is that the unilateral choice is unfair. But we must be mindful that the State or an arm thereof has the authority to condemn property for public use. It alone institutes the proceedings (except perhaps in those rare instances when the citizen employs mandamus to compel their institution, if that can be said to constitute institution of the action). If alternative procedures existed the agency would make the choice as to which to pursue, even if the words "at the option of" were not present.

Thus, since there is no constitutional right to trial by jury, the test of validity is not whether alternative procedures are established to be used at the election of the public entity but (1) whether the objective of each one is

to achieve just compensation for the taking and whether each one, in and of itself, satisfies the demands of due process, *i.e.*, notice and fair hearing before an impartial tribunal competent to reach a just result, and (2) whether the public agency may be classified so as to warrant the separate legislative treatment.

It is obvious in this instance that the proceeding prescribed for arriving at just compensation under the eminent domain act or under the airport terminal act is sufficient unto itself as a due process mechanism. Each one is designed to produce and is capable of producing a just result. No one suggests to the contrary. If there were inequality within the framework of either procedure, for example, if the Authority were given and the property owner were denied a right of appeal, *In re City of Rochester*, 224 N. Y. 386, 121 N. E. 102 (1918); *State* v. *Wisconsin-Minnesota Light and Power Co.*, 165 Wis. 430, 162 N. W. 433 (1917), or the right to introduce evidence of comparable sales, or offers to sell or purchase, *Georgia Power Co.* v. *Brooks*, 207 Ga. 406, 62 S. E. 2d 183 (1950), in one mode of procedure which the condemnor had the option to select and did select in the particular case, a deprivation of equal protection of law would exist. But so long as each party to the litigation is accorded evenhanded treatment legislatively within each procedural technique, the fact that the Authority (assuming a valid basis for separate treatment) has the choice of one of two equally constitutional alternatives does not make the grant of the choice unconstitutional. Property owners are not deprived thereby of substantial equality in the adjudication of their rights; no matter of essential justice or fundamental right is affected. See *Marin Municipal Water Dist.* v. *North Coast Water Co.*, *supra* at 472; *Manchester Housing Authority* v. *Fisk*, 102 N. H. 280, 155 A. 2d 186, 189 (1959). In this connection a comment

of the Chancellor in *Scudder* v. *Trenton Delaware Fe Co.*, 1 N. J. Eq. 694, 721-22 (1832), in denying that trial by jury was required in eminent domain actions, is worthy of mention:

> "There is no reason why three indifferent men, selected by the chief justice from the body of the state, for their probity and independence, should not, in a mere matter of valuation, exercise as just a judgment, and be in all things as discreet and impartial, as a jury of the vicinage."

In the ultimate the conclusion to be drawn from the cases and texts is that establishment of various as well as alternate methods of procedure for the valuation of property being expropriated is a matter of legislative discretion. Where election of one of two modes is given to a public condemnor (which may be classified specially) the choice is valid so long as the remedies provided are equal from a due process standpoint. The wisdom of the legislative act is not a matter for the judicial branch of the government. *Cf. United States* v. *Alexander*, 47 F. Supp. 900, 912 (W. D. Va. 1942).

As has already been indicated, many cases are to be found wherein the right of a public agency to elect to proceed under one or the other of two legislatively created procedures has been recognized as valid. The fact that material differences existed in the two forms of procedure did not alter the result. Constitutional requirements were deemed satisfied so long as each method fairly provided for the achievement of just compensation. *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (2d Cir. 1942), *cert. den.* 317 U. S. 698, 87 L. Ed. 558 (1943); *United States* v. *Alexander*, *supra*; *United States* v. *Certain Lands*, 43 F. Supp. 578 (E. D. N. Y. 1942); *Lybrand* v. *Forman*, 259 Ala.

354, 67 So. 2d 4 (1953); *City of Oakland* v. *Parker*, —— Cal. ——, 237 P. 69 (D. C. of App. 1924); *Eed* v. *City of Utica*, 103 Kan. 567, 175 Pac. 635 (1918); *In re Gallagher Ave. in City of Hamtramck*, 300 Mich. 309, 1 N. W. 2d 553 (1942); *Muskingum Watershed Conservancy Dist.* v. *Funk*, 132 Ohio St. 593, 9 N. E. 2d 512 (1937); *Town of Cookeville* v. *Farley*, 171 Tenn. 2[illegible] 102 S. W. 2d 56 (1937); *City of Chattanooga* v. *State*, 151 Tenn. 691, 272 S. W. 432 (1925); *Doughty* v. *De Fee*, —— Tex. ——, 152 S. W. 2d 404 (1941); *Ewing* v. *Board of Sup'rs of Nelson County*, 131 Va. 471, 109 S. E. 474 (1921); *Board of Sup'rs* v. *Proffit*, 129 Va. 9, 105 S. E. 666 (1921); *State* v. *Circuit Court*, 189 Wis. 265, 207 N. W. 252 (1926). In the two New York cases, *United States* v. *Certain Lands*, *supra*, and *United States* v. *243.22 Acres of Land*, *supra*, the Federal District Courts were concerned with *Article* I, §7, of the New York Constitution which provides that compensation for private property taken for public use "shall be ascertained by a jury, or by the supreme court without a jury, but not by a referee other than an official referee, or not by less than three commissioners, appointed by a court of record as may be prescribed by law." Both courts recognized the right of the State to select any one of the methods outlined so long as it provided a fair and reasonable avenue to just compensation. There was no suggestion that selection by the State of commissioners rather than jurors to ascertain damages, denied the 14th Amendment's guaranty of equal protection to the property owner.

Pacific Telephone & Telegraph Co. v. *Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913), dealt with a somewhat analogous situation. The Constitution of California provided for trial by jury in eminent domain cases. It also created the Railroad Commission, gave it jurisdiction over utilities as well as the authority to hear, determine and fix com-

pensation without jury intervention in condemnation cases involving utilities. In the cited case it was argued that such practice was violative of the 14th Amendment of the Federal Constitution since it deprived utilities of the trial by jury that was given to all other persons whose property was taken for public use. The contention was overruled, the Supreme Court saying:

> "The requirement of a jury and of a prepayment of damages is not a part of the federal Constitution, nor of that of many of our states. It is in those jurisdictions quite a common practice to create boards and commissions to exercise the power on behalf of the state, and to make awards between litigants. It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated interrelations, where a taking of property is involved, a great saving of time, and a more just award may be expected from a learned, skilled, and dispassionate tribunal such as the Railroad Commission than can ever be hoped for them the haphazard verdicts of juries. And very good reasons therefore appear why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body, and not by a jury. It is therefore concluded that no violence is done to the rights of petitioner under the Constitution of the United States by this proviso of the state Constitution authorizing the Railroad Commission to exercise the power of eminent domain and assess damages for a taking of property." 137 *Pac.* at 1137.

See also, *Kennebec Water Dist.* v. *City of Waterville*, 96 Me. 234, 52 Atl. 774 (1902).

The remaining question is whether the Port Authority

may be specially classified for purposes of eminent domain proceedings. We have no doubt that it may be so treated. Nichols properly observes that the rule of equal protection applies fully in the framework of a specific mechanism for ascertaining value within a particular class of condemnors. But the operation of that guaranty does not demand that the procedure to condemn by the variant classes of condemnors be the same. The action may be classified and adapted to the peculiar conditions and problems inherent in the character of the condemnation. 1 *Nichols, op. cit. supra* §4.15[2]. The principle of common application is that if there be any reasonably conceivable basis for the separate treatment the legislation will not be voided. *Robson* v. *Rodriquez*, 26 N. J. 517, 524 (1958). So far as eminent domain proceedings are concerned, the equal protection clause does not contain a mandate for exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another. *Dohany* v. *Rogers, supra.* In the *Dohany* case the United States Supreme Court accepted the fact that eminent domain proceedings were being conducted by the State Highway Commissioner on behalf of the State as in itself a valid basis for the exercise of legislative judgment to provide a different procedure from that prescribed for the exercise of condemnation by a private corporation. 281 *U. S.* at 369. Certainly separate classification in the case of such an important arm of the sovereign states of New Jersey and New York as the Authority should not present a more formidable constitutional obstacle. (Here it may be noted that the New York legislation contains no grant of jury trial in Authority condemnation cases in that state. And in the air terminal act the Authority is given the option of utilizing the special procedure set forth therein or that pre-

scribed by the general condemnation law. *N.Y.L.* 1947, c. 882, § 5; 12 *Consolidated Laws Service*, c. 16?, §15; *L.* 1920, c. 923 as amended; 2 *Consolidated Laws Service, Condemnation Law*, § 1, *et seq.*).

There are other realistically conceivable reasons for special treatment for the Authority in this field. In the laying out and construction of bridges and tunnels and their extensive approaches in the Hudson River waterfront area, many large and small lots and tracts of land of various kinds, vacant, residential, business and industrial, would be required. Complex problems of administration and valuation would be met. Moreover, the choice of locale for construction is limited to the Port vicinity at points on opposite sides of the River, making coordination necessary in the expropriation proceedings. The principle that a straight line is the shortest distance between two points presumably cannot be ignored. Accordingly, we believe sufficient factors are present to support the legislative judgment that the Authority should be classified separately for eminent domain procedure purposes. More particularly, in the light of the whole problem, establishment of the alternative modes of proceeding and in giving the Authority the option of selecting the one to be followed cannot be regarded as being without any reasonable justification. Manifestly, where many types and sizes of properties are being taken and the problems arising therefrom are complex, greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen. In the present undertaking of the Authority, which concerns only the construction of an additional deck on the George Washington Bridge so that a substantial part of the existing approaches may be utilized, 40 tracts were the subject of this one action. And undoubtedly those parcels represent only a part of the total acquisition neces-

sary. In such a context the language of the Federal District Court in *Via v. State Commission on Conservation, etc.*, 9 F. Supp. 556, 563 (W. D. Va. 1935), *aff'd* 296 U. S. 549, 84 L. Ed. 388 (1935), is pertinent:

> "If, because of the large number of tracts of land involved or for other reasons, the general statute was believed to be impracticable or awkward of operation, the Legislature had an undoubted right to provide for condemnation by a procedure more conveniently fitted to the nature of the proceedings; provided, of course, that the new statute in itself was not invalid. And the mere fact that its provisions varied from those of the general statute did not render it invalid."

That statement represents generally the basis for the special non-jury proceedings incorporated in the Tennessee Valley Authority Act. In fact, it seems to provide in large measure the reasons which impel the various Federal District Courts to eliminate jury trials on application under Rule 71A. See *United States v. Delaware, Lackawanna & W. R.R.*, 264 F. 2d 112 (3rd Cir. 1959), *cert. den.* 361 U. S. 819, 4 L. Ed. 2d 65 (1959); *United States v. Buhler*, 254 F. 2d 876 (5th Cir. 1958); *United States v. 2792.82 Acres of Land*, 114 F. Supp. 76 (E. D. S. C. 1953). And in our judgment the same factors may well have influenced our Legislature in enacting the amendment with which we are concerned here. Whether the course adopted in the federal domain, which lodges in the judiciary the authority to decide if jury trial should be had, is better or wiser is not a matter for judicial determination under the circumstances of this case. The wisdom of granting to the Authority the choice of the particular procedures involved here must be argued before the legislative tribunal.

Appendix A

Naturally, it is implicit in the grant that the option will be used reasonably by the Authority. In connection with the accomplishment of a project such as the one under discussion, an election to acquire *one* tract by the general eminent domain proceeding, with its trial by jury an appeal from the award of commissioners, and *the next one* by the air terminal act procedure, could find no justification in the 1956 amendment to *N.J.S.A.* 32:1-132. In such situations, except for some unique circumstance associated with a particular transaction, an election of procedure once made must control condemnation proceedings for the entire project.

In conclusion, it may be said that the clauses of the federal and state constitutions on which defendants rely do not prohibit a state from establishing different rules of procedure in eminent-domain cases for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any property owner of substantial equality in the adjudication of his rights. So long as the Legislature provides a fair and equitable inquiry, in which the parties interested are allowed to be heard and present evidence, and are protected in their right to have just compensation, they are not deprived of the equal protection of the law because other classes of cases have been provided with a different method or a different tribunal for accomplishing the same result. See *Marin Municipal Water Dist. v. North Coast Water Co., supra; Pacific Telephone & Telegraph Co. v. Eshleman, supra; Kennebec Water Dist. v. City of Waterville, supra; Manchester Housing Authority v. Fisk, supra.*

Accordingly, the judgment is affirmed.

Appendix B

Dissenting Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)

(Filed—January 23, 1961)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE E. HEMINO, JR., et al.,

Defendants,

and

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Defendants-Appellants.

PROCTOR, J. (Dissenting)

With today's decision, The Port of New York Authority becomes the only litigant in the State of New Jersey with the exclusive right in condemnation proceedings to determine whether trial shall be by jury. I must dissent, because I think that *N.J.S.A.* 32:1-132, insofar as it confers that exclusive right on the Authority violates the Fourteenth Amendment to the Federal Constitution. For the purpose of analyzing the issue raised by this appeal it is essential to distinguish between the rights inherent in the concept of due process and the concept of equal protection of the law. The majority devotes considerable

effort to demonstrate that due process is satisfied if the property owner is afforded reasonable notice and the opportunity to have his case heard by an impartial tribunal. They also emphasize that, in the context of determining just compensation for condemned property, due process does not require a jury trial. I agree with both propositions. But the appellants in this case have never argued that N.J.S.A. 32:1-132 deprives them of due process. Their assertion is that they have been denied equal protection of the law in that the Authority is given the right to elect trial by jury while they are not. Equal protection is a distinct constitutional guarantee which in effect provides that lawmakers must afford to all persons within a class equality of treatment, even though such persons also enjoy the protections of due process. *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921). It also requires that any legislative classification of persons be reasonably related to a recognized objective of government. *Washington National Ins. Co. v. Board of Review*, 1 N. J. 545 (1949).

Is a property owner afforded equality of treatment, within the meaning of the above-outlined principles, when the Authority as opposing party litigant *alone* has the right to decide whether trial shall be by jury? Otherwise stated, is there something so peculiar about the status of the Authority as a litigant that it may justifiably be put in a class apart from condemnee-litigants and be afforded the important advantage of selecting what tribunal shall decide the amount of just compensation? I don't think so. The majority, in an exhaustive opinion, has not cited a single case where a public agency is given a similar option and I know of none. Furthermore, I do not believe that the cases which are cited are apposite to the issue before us for decision.

Appendix B

The majority relies in part, for example, on cases which sustain condemnation procedures prescribed by the Tennessee Valley Authority Act. *Welch v. Tennessee Valley Authority*, 108 F. 2d 95 (6th Cir. 1939), *cert. denied United States v. Welch*, 309 U. S. 688, 84 L. Ed. 1030 (1940); *United States v. Parmar*, 105 F. Supp. 534 (W.D.Ky. 1952). But these merely hold that different classes of condemnors need not follow the same condemnation procedures. Whereas condemnors are ordinarily entitled under Rule 71A of the Federal Rules of Civil Procedure to a jury determination of compensation, the T.V.A. must have that issue determined without a jury. I have no doubt that the T.V.A. as a condemnor is in a class which may be reasonably differentiated from other condemnors, but the fact here pertinent is that when the T.V.A. condemns property *neither* it *nor* the condemnee-litigant may choose to have a trial by jury. Under the statute both are afforded equality of treatment since neither can avoid the requirement of having compensation determined without a jury. *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913), also relied on by the majority, is simply the reverse side of the coin. There it was held that the equal protection clause does not require the same condemnation procedures to be applied to different classes of condemnees. The Constitution of California which provides for trial by jury in general eminent domain proceedings also provided that when utility land was taken compensation would be fixed by the Railroad Commission without a jury. I have no doubt that utilities may reasonably be differentiated as a class from other condemnees for purposes of deciding which are entitled to a jury trial on compensation, but again the fact here pertinent is that when utility land is condemned *neither* the condemnor *nor* condemnee-utility may choose

to have compensation determined by a jury. Both are confined to a determination by the Railroad Commission alone.

Furthermore, I do not see how any of the cases cited by the majority for the proposition that a public agency may elect to proceed under one or another of several legislatively-created procedures is authority for the issue before us. Only the New Hampshire and the two New York cases concerned alternative condemnation procedures for determining compensation, at least one of which included trial by jury. *Manchester Housing Authority* v. *Fisk*, 102 N.H. 280, 155 A. 2d 186 (1959); *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (2d Cir. 1942), *cert. denied*, 317 U. S. 698, 87 L. Ed. 558 (1943); *United States* v. *Certain Lands*, 43 F. Supp. 558 (E.D.N.Y. 1942). *Manchester Housing Authority* v. *Fisk*, *supra*, is the closest to the present case, but not helpful to a resolution of the issue before us. There it was held that a condemning agency could proceed under one of several statutes which provided different procedures for the assessment of compensation without violating due process. I agree that the demands of due process were satisfied in that case. But that is not the issue before this court. The condemnee in *Manchester* evidently did not argue that he was denied equal protection of the law and the court nowhere considered his rights under that constitutional provision. Involved in the two New York cases was the provision of the New York Constitution that compensation for private property taken for public use "shall be ascertained by a jury, or by the Supreme Court without a jury. . . ." It is true, as the majority states, that "Both courts recognized the right of the State to select any one of the modes outlined so long as it provided a fair and reasonable avenue to just compensation." But it was the

judiciary, not the condemning agency, which selected the appropriate method for trial in those cases. This distinction is vital to a determination of whether the condemnees were afforded equal protection of the law. The trial judge, as an impartial decision-maker, could choose that procedure which he regarded as best adapted to a determination of just compensation, unmotivated by the litigious interest which might affect the condemning agency as party-plaintiff. A similar procedure is followed under Rule 71A of the Federal Rules of Civil Procedure. Ordinarily any part may have a jury trial on demand, but the court, *not the condemning agency*, may decide in its discretion that the peculiar circumstances of the case require a determination by appointed commissioners.

As mentioned above, the remainder of the cases which the majority cites for the proposition that a condemning agency may select one or another of several legislatively created procedures, do not involve trial with or without a jury. More significantly, these cases concern a choice of procedures which by its nature could not involve a question of equal protection. *Union School District* v. *Starr Commonwealth For Boys*, 322 Mich. 165, 33 N. W. 2d 807 (1948) is typical. There the condemning agency was taking land for the erection of a school. Under one state statute, the agency was required first to negotiate with the condemnee before initiating condemnation proceedings. Under another statute negotiations prior to taking were unnecessary. The school district chose to proceed under the latter statute; and the Michigan Supreme Court held that the choice of procedure did not violate the condemnee's constitutional rights. As the majority here notes, the State or its agencies alone institute condemnation proceedings; the condemnee, except in rare instances, cannot. The right to take land by eminent domain *as distinct from determination of compensation* is so fundamental an attribute of sovereignty that

given an admitted public use, on hearing need be afforded a condemnee. It therefore seems to me that a condemnee cannot claim denial of equal protection because the condemning agency is afforded a choice of procedures for the taking. But that is not the issue here.

The majority has enunciated its adherence to a principle which should be dispositive of the case before us: It says:

> "It is obvious in this instance that the proceeding prescribed for arriving at just compensation under the eminent domain act or under the airport terminal act is sufficient unto itself as a due process mechanism. Each one is designed to produce and is capable of producing a just result. No one suggests to the contrary. *If there were inequality within the framework of either procedure*, for example, if the Authority were given and the property owner were denied a right of appeal, (citations omitted) or the right to introduce evidence of comparable sales, or offers to sell or purchase (citation omitted), in one mode of procedure which the condemnor had the option to select and did select in the particular case, *a deprivation of equal protection of law would exist.*" (Italics supplied.

The majority expressly says that a statute giving a condemning agency an unilateral right of appeal from a compensation award would be unconstitutional. The ultimate purpose of such an agency in appealing from an award is to achieve a redetermination of the compensation at a lower amount. Similarly, realistically viewed, it seems to me the Authority will exercise its option under *N.J.S.A.* 32:1-132 to elect that tribunal (judge or jury) which the Authority thinks will award a lower amount. In condemnation proceedings, therefore, where the only issue in dispute, as here, is the amount of compensation, an unilateral right to trial by jury is no less offensive than a unilateral right of appeal.

Applying logically to the facts of the present case the majority's principle that an unilateral option within the framework of a statutory procedure would be invalid, I take it that if *N.J.S.A.* 32:1-132, without reference to the Eminent Domain or Airport Terminal Acts, gave the Authority power to condemn land for approaches to bridges and tunnels *and* provided that the Authority *alone* might choose to have a judge or jury determine just compensation, the statute would be unconstitutional. It seems to me highly artificial to make a condemnee's rights under the equal protection clause depend on whether the Authority's option derives from the self-contained provisions of a single statute or from the incorporation by reference of procedures in two distinct statutes. In either case, the result and the effect upon the condemnee are the same. What the court said in *In re City of Rochester*, 224 N. Y. 386, 121 N. E. 102 (1918), cited with approval by the majority, is particularly applicable to the present case:

> "'In the courts, parties similarly situated are entitled to equal rights and privileges. The Constitution forbids discrimination between them.'" *Id.* 224 N. Y. at 397, 121 N. E. 105.

The concept of fair play is the heart of equal protection; and it seems to me that fair play requires that the same officialy prescribed advantage and disandvantages should be enjoyed or suffered by both parties to a law suit. I would therefore hold that *N.J.S.A.* 32:1-132, insofar as it affords to The Port of New York Authority alone the right to choose whether compensation for condemned property will be tried by jury is unconstitutional as a denial of the condemnee's right to equal protection of the law. Accordingly, I would reverse the judgment below. I am authorized to say that Mr. Justice Schettino joins in this dissent.

Appendix C

Per Curiam Opinion of the Supreme Court of New Jersey (No. A-82, September Term—1960)

(Filed—January 23, 1961)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

OTTO K. BAUMANN, *et al.*,

Defendants,

and

ELM LAND CO., INC.,

Defendant-Appellant.

Submitted December 21, 1960. Decided January 23, 1961.

MR. RUSSELL E. WATSON for plaintiff-respondent, The Port of New York Authority.
(MR. ROBERT S. TOBIN, of counsel.)

MR. NELSON G. GROSS for defendant-appellant, Elm Land Co., Inc.
(MESSRS. GROSS AND GROSS, attorneys.)

PER CURIAM.

The issues in this appeal, which was certified on our own motion prior to argument in the Appellate Division, are the same as those presented in *The Port of New York Authority v. Heming and Cervieri*, —— N. J. —— (filed today). The parties having agreed that the determination in that case would be controlling, and our opinion affirming the judgment therein having been filed, the judgment herein is accordingly affirmed.

Appendix D

Mandate on Affirmance of Supreme Court of New Jersey

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE H. HEMING, JR., *et al.*,

Defendants,

and

ELIZABETH M. CERVIERI AND JOHN A. CERVIERI,

Defendants-Appellants.

This cause having been duly argued before this Court by Mr. Nelson G. Gross, counsel for the appellants and Mr. Russell E. Watson, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix B

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-third day of January, 1961.

Filed
Jan. 23, 1961

John H. Gildea
Clerk

John H. Gildea
Clerk
Clerk of the Supreme Court

Appendix E

Mandate on Affirmance of Supreme Court of New Jersey

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

OTTO K. BAUMANN, *et al.*,

Defendants,

and

ELM LAND CO., INC.,

Defendant-Appellant.

This cause having been duly argued before this Court by Mr. Nelson G. Gross, counsel for the appellant and Mr. Russell E. Watson, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix E

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-third day of January, 1961.

FILED
Jan. 23, 1961

JOHN H. GILDEA
Clerk

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court

FILE COPY

MAY 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 886.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,
Appellants,

vs.

THE PORT OF NEW YORK AUTHORITY,
Appellee.

ELM LAND CO., INC.,
Appellant,

vs.

THE PORT OF NEW YORK AUTHORITY,
Appellee.

MOTION TO DISMISS THE APPEALS AND BRIEF.

SIDNEY GOLDSTEIN,
General Counsel
The Port of New York Authority
Attorney for Appellee
111 Eighth Avenue
New York 11, New York

On the Brief:
RUSSELL E. WATSON
JOSEPH LESSER
ROBERT S. TOBIN

TABLE OF CONTENTS.

	PAGE
MOTION TO DISMISS THE APPEALS	1
BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS THE APPEALS:	
INTRODUCTION	3
STATUTES INVOLVED	4
COUNTER-STATEMENT OF THE CASE	6
ARGUMENT:	
Point I. The question presented by these appeals is not substantial	9
Point II. Appellants have not complied with Rule 15 (1) (d) and (e) relating to the substance of the Jurisdictional Statement	23
Point III. The question presented by these appeals was not timely or properly raised in the trial court and in consequence thereof has become moot	25
CONCLUSION	28
APPENDIX—PERTINENT STATUTES	29
N. J. S. A. 20:1-9	29
N. J. S. A. 20:1-16	29
N. J. S. A. 20:1-20	29
N. J. S. A. 32:1-35.9(c)	29
N. J. S. A. 32:1-35.15(i)	32
N. J. S. A. 32:1-35.33	32

CASES CITED.

	PAGE
Abbott v. *Beth Israel Cemetery Ass'n of Woodbridge*, 13 N. J. 528, 100 A. 2d 532 (Sup. Ct. 1953)	12
A. Backus, Jr. & Sons v. *Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853 (1898)	10, 11
Bogni v. *Perotti*, 224 Mass. 125, 122 N. E. 853 (Sup. Jud. Ct. Mass. 1916)	22
Brown v. *New Jersey*, 175 U. S. 172, 44 L. Ed. 119 (1899)	10
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839 (1899)	25
Commissioner v. *Shamberg's Estate*, 144 F. 2d 998 (2 Cir. 1944), *cert. denied*, 323 U. S. 792, 89 L. Ed. 631 (1944)	6
Davis v. *O'Hara*, 266 U. S. 314, 69 L. Ed. 303 (1923)	26
Davis v. *Wechsler*, 263 U. S. 22, 68 L. Ed. 143 (1925)	26
Dohany v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930)	10, 11, 16
Erie Railroad Co. v. *Purdy*, 185 U. S. 148, 45 L. Ed. 847 (1902)	25, 26
Fish v. *Morgenthau*, 10 F. Supp. 613 (U. S. D. C. N. H. 1935)	11
Kedroff v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 97 L. Ed. 120 (1952)	25
Kohl v. *United States*, 91 U. S. 367, 23 L. Ed. 449 (1876)	14, 15
Local No. 8-6 v. *Missouri*, 361 U. S. 363, 4 L. Ed. 2d 373 (1960)	27
Marin Municipal Water District v. *North Coast Water Co.*, 178 Cal. 308, 173 Pac. 469 (Sup. Ct. Cal. 1918)	10

PAGE

Morris May Realty Corp. v. *Board of Chosen Freeholders of the County of Monmouth*, 18 N. J. 269 113 A. 2d 649 (Sup. Ct. 1955) 12

Ohio Oil Co. v. *Conway*, 281 U. S. 146, 74 L. Ed. 775 (1930) 18

Peirson v. *Boston El. Ry. Co.*, 191 Mass. 223, 77 N. E. 769 (Sup. Jud. Ct. Mass. 1906) 16

Putnam v. *Ford*, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App., Va. 1930) 17, 18

Seacombe v. *Milwaukee & St. Paul Railway Co.*, 23 Wall. 108, 23 L. Ed. 67 (1874) 11, 12

Scudder v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694 (Ch. 1832) 15

State v. *Fisher*, 54 N. J. Super. 274, 148 A. 2d 735 (App. Div. 1959) 11, 12

Sugerman v. *U. S.*, 249 U. S. 182, 63 L. Ed. 550 (1918) 23

Town of Montclair v. *Stanoyevich*, 6 N. J. 479, 79 A. 2d 288 (Sup. Ct. 1951) 15

Traux v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254 (1921) 22

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97 (1908) 10

U. S. v. *Heinze*, 218 U. S. 532, 54 L. Ed. 1139 (1910) 11, 17, 18

U. S. Surety Co. v. *American Fruit Products Co.*, 238 U. S. 140, 59 L. Ed. 1238 (1914) 9

United States v. *Burnison*, 339 U. S. 87, 94 L. Ed. 675 (1950) 16

United States v. *Jones*, 109 U. S. 513, 27 L. Ed. 1015 (1883) 12

United States v. *McIntosh*, 2 F. Supp. 244 (U. S. D. C. Va. 1932) 11

PAGE

Vanneck Realty Corp. v. *City of New York*, 259 App. Div. 461, 19 N. Y. S. 2d 544, *rehearing denied* 259 App. Div. 1001, 20 N. Y. S. 2d 984, *aff'd* 284 N. Y. 403, 31 N. E. 2d 505, *rehearing denied* 285 N. Y. 607, 33 N. E. 2d 542 (1st Department 1940) 14

Washington National Insurance Co. v. *Board of Review*, 1 N. J. 545 (1949) 10

Winters v. *People of the State of New York*, 333 U. S. 507, 92 L. Ed. 840 (1947) 25

Zucht v. *King*, 260 U. S. 174, 67 L. Ed. 194 (1922) .. 23

UNITED STATES CONSTITUTION CITED.

Fourteenth Amendment 3, 25

FEDERAL STATUTE CITED.

42 Stat. 174 (Joint Resolution of Congress, Aug. 23, 1921) 6

UNITED STATES SUPREME COURT RULES CITED.

Rule 15 25
Rule 15(1)(d) 4, 23
Rule 15(1)(e) 4, 23, 24
Rule 16 1

NEW JERSEY CONSTITUTION—1947 CITED.

Article VI, Sec. 3, Par. 2 15
Article VI, Sec. 4, Par. 1 15
Article VI, Sec. 4, Par. 5 15

New Jersey Statutes Cited.

	PAGE
Laws of 1921, Chapter 151	6
Laws of 1947, Chapter 43, sec. 15	5
N. J. S. A. 20:1-1 et seq.	5, 7
N. J. S. A. 20:1-9	5
N. J. S. A. 20:1-16	5
N. J. S. A. 20:1-20	5
N. J. S. A. 32:1-35.9(c)	5
N. J. S. A. 32:1-35.15(i)	5
N. J. S. A. 32:1-35.15 et seq.	5, 7, 20, 21
N. J. S. A. 32:1-35.33	5
N. J. S. A. 32:1-132	3, 4, 7, 9, 13

New Jersey Rules Cited.

R. R. 4:3-2	14
R. R. 4:39-1	15
R. R. 5:2-1	14
R. R. 7:8-1	15

Statute of New York Cited.

Laws of 1921, Chapter 154	6

Other Authorities Cited.

12 Am. Jur. 241, Section 543	18
Nichols on Eminent Domain, Volume 1 (3rd Ed.), page 315	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 886.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Appellants,

vs.

THE PORT OF NEW YORK AUTHORITY,

Appellee.

ELM LAND CO., INC.,

Appellant,

vs.

THE PORT OF NEW YORK AUTHORITY,

Appellee.

MOTION TO DISMISS THE APPEALS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeals herein be dismissed on the grounds that the question presented by these appeals is so unsubstantial as not

to warrant further argument (Point I); that the Jurisdictional Statement does not comply with the Revised Rules of the Supreme Court of the United States (Point II); and that the federal question sought to be reviewed was not timely or properly raised in the trial court and in consequence thereof has become moot (Point III).

SIDNEY GOLDSTEIN,
General Counsel,
The Port of New York Authority,
Attorney for Appellee.

Dated: May 8, 1961.

Brief of Appellee in Support of Motion to Dismiss the Appeals.

Introduction.

This Memorandum is submitted by appellee, The Port of New York Authority, in support of its motion to dismiss two appeals by appellants from the New Jersey Supreme Court's judgment affirming the trial court's action in sustaining, over appellants' belated objections, the constitutionality of N. J. S. A. 32:1-132.

Appellants contend that state legislation which accords the Port Authority, as condemnor, and not the appellants, as condemnees, a procedural option to have the amount of just compensation to which a condemnee is entitled determined either by a court or by a jury violates the Fourteenth Amendment's equal protection clause. Appellants make this contention in spite of the fact that they fail to show how this option can possibly prejudice them or deprive them of any right to which they may be entitled because they, in effect, concede, as they must, that either procedural option open to the Port Authority is perfectly constitutional since this Court as well as the state courts have uniformly held that there is no constitutional right to trial by jury in condemnation proceedings.

Accordingly, the Port Authority moves to dismiss these appeals on the ground that the alleged federal question is so unsubstantial as not to warrant consideration by this Court. Appellants' alleged federal question would *only* be substantial if either procedural option could in fact be shown to be unconstitutional. This, of course, cannot be done.

In addition, the Port Authority moves to dismiss these appeals on the grounds that they are not within this Court's jurisdiction because appellants' Jurisdictional Statement does not comply with Rule 15 (1) (d) and (e) of this Court and that the alleged federal question was not timely or properly raised in the trial court and in consequence thereof is now moot.

Statutes Involved.

N. J. S. A. 32:1-132, whose constitutionality is here challenged, was quoted in full by appellants in their Jurisdictional Statement, page 3. The critical portion of that statute is the second paragraph which reads in pertinent part as follows:

> "The Port Authority may acquire * * * such property, whether a fee simple absolute or a lesser interest by condemnation or the exercise of the right of eminent domain under and pursuant to the provisions of the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jersey, Title 20:1-1 et seq., in the case of property located in such State, or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, and as provided in section 15 of chapter 802 of the laws of New York, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, or pursuant to such other and alternate procedure as may be provided by law."

In this paragraph, the questioned procedural option is granted to the Port Authority to proceed either under N. J. S. A. 20:1-1 et seq. (sometimes referred to as Title 20) or under Section 15 of Chapter 43, Laws of New Jersey, 1947, as amended, N. J. S. A. 32:1-35.15 et seq. (sometimes referred to as the Airport Act).

Title 20 provides for a trial of the issue of just compensation before commissioners (N. J. S. A. 20:1-9, as amended) and thereafter on appeal it allows for a trial *de novo* before a jury (N. J. S. A. 20:1-16, as amended and N. J. S. A. 20:1-20, as amended). On the other hand, the Airport Act provides that the issue of just compensation shall be determined by a court (N. J. S. A. 32:1-35.15(i)). Contrary to the inference made by appellants on page 5, line 5, of their Jurisdictional Statement that only the landowner is prohibited from demanding a jury trial under N. J. S. A. 32:1-35.15(i) the fact is that under this subsection neither party—the condemning authority nor the landowner—can demand a jury trial.

Both Title 20 and the Airport Act provide for an appeal by either party as to any matter involved in the condemnation proceedings.

Options similar to the one challenged are also contained in other statutes relating to the Port Authority. Thus, the Port Authority's air terminal statute includes such an option (N. J. S. A. 32:1-35.5(c)) as does the condemnation procedure for Port Authority marine terminals (N. J. S. A. 32:1-35.33). The latter two statutes have been in effect for 14 years without challenge. The statutory sections here referred to are quoted in full in an appendix to this brief.

Counter-statement of the Case.

Appellee, The Port of New York Authority, is an agency of the States of New Jersey and New York, created in 1921 by Compact between them (Ch. 151, Laws of New Jersey, 1921; Ch. 154, Laws of New York, 1921; N. J. S. A. 32:1-1 to 24) consented to by Congress (Joint Resolution Aug. 23, 1921, 42 Stat. 174). See *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (2 Cir., 1944), *cert. denied*, 323 U. S. 792, 89 L. Ed. 631 (1944).

The present appeals arise out of the Port Authority's action in condemning property in Fort Lee, New Jersey, in the course of constructing improved approaches to the George Washington Bridge and its new Second Deck. This Bridge links Fort Lee, New Jersey, with the area known as Washington Heights in New York City. The appeals are brought by two property owners who owned five of the 40 parcels condemned.

Appellant, the Elm Land Co., Inc., was the former owner of two parcels lying entirely within a State highway easement. These parcels were for the most part about 18 feet under a state roadway and hence both legal and practical access to them was lacking. The trial court awarded Elm Land nominal damages totalling $1500 for these two parcels, $1,000 for one and $500 for the other.

Appellants, Elizabeth and John Cervieri, owned three parcels of property which the Port Authority acquired in these proceedings. After the hearing on just compensation for all three, the trial court rendered awards in the amount of $7,100 for the parcel described in Count 7 of the Complaint, $1,412 for the parcel described in Count 3 and

$133,145 for the parcel described in Count 10. Notwithstanding the fact that Count 10 involves the same alleged constitutional issue which Counts 3 and 7 raise, the Cerviers did not appeal from Count 10 presumably because they were satisfied with the compensation awarded them by the Court.

The bi-State legislation relating to the George Washington Bridge provides that the Port Authority may acquire real property for bridge purposes by exercise of the right of eminent domain under the provisions of the New York condemnation law, in the case of property located in New York, and under the provisions of N. J. S. A. 20:1-1, *et seq.*, in the case of property located in New Jersey, or at the option of the Authority, as specifically provided in N. J. S. A. 32:1-132, the Authority may proceed under the provisions of N. J. S. A. 32:1-35.15 (the Airport Act), or pursuant to such other alternate procedures as may be provided by law.

It is this procedural option accorded the Port Authority which forms the basis of appellants' contentions that their equal protection rights under the Fourteenth Amendment have been violated.

The Port Authority elected to acquire the 40 parcels located in Fort Lee, New Jersey, including the parcels involved in these appeals, pursuant to the option accorded it by N. J. S. A. 32:1-132 as provided in N. J. S. A. 32:1-35.15, the Airport Act.

The orders to show cause directed the named appellants to show cause "why an order should not be entered * * * providing that this Court determine without a jury and with a view of said real property, the compensation which

should justly be made to owners of said real property and should thereafter enter a judgment in the amount so determined."

The orders to show cause provided that title would vest in the appellee on September 5, 1958, the return date of the orders. This was about five (5) weeks after the filing of the complaints.

Upon the return date, September 5, 1958, the Cervieris appeared pro se and though appellants failed to mention it in their Jurisdictional Statement, The Elm Land Co., Inc. appeared by counsel since substituted for by present counsel.

No objection was made on the return date either by the Cervieris or by Elm Land's counsel to the vesting of title in the Port Authority or to the method set forth in the order to show cause for the assessment of just compensation.

In reliance on this, the Port Authority on October 27, 1958, commenced the construction of new and improved New Jersey approach roadways to the George Washington Bridge and its Second Deck.

It was not until the appellants' parcels came on for trial on the issue of just compensation, over one and a half years after the vesting of title in the Port Authority, that the constitutional question here urged was first raised. At this stage of the proceedings appellants in their notice of motion stated their intention to move "for an order granting said defendants [appellants] the right to demand trial by jury on the ground that R. S. 32:1-132 as amended * * * [was] unconstitutional in that it deprive[d] defendants [appellants] of equal protection under the laws."

However, the motion that was in fact argued by appellants was a motion to dismiss the respective complaints on the ground that N. J. S. A. 32:1-132 was unconstitutional in that it deprived them of equal protection of the laws. Appellants' motions were denied by the trial court without opinion.

The Port Authority had argued to the trial court that appellants' motions should be dismissed on two grounds: Firstly, because they were not timely made in that appellants had failed to appeal from the order vesting title in the Port Authority. Secondly, because the option accorded the Port Authority was perfectly constitutional.

Appellants appealed to the Appellate Division of the New Jersey Superior Court from the final judgments of the trial court awarding them compensation. The New Jersey Supreme Court on its own motion brought appellants' appeals directly to it. The New Jersey Supreme Court affirmed the judgments below. From that affirmance appellants appeal to this Court.

ARGUMENT.

POINT I.

The question presented by these appeals is not substantial.

The true reason for these appeals is not the denial of a substantial and fundamental right, but is merely a vehicle for securing to the appellants a re-hearing on the issue of just compensation. In *U. S. Surety Co.* v. *American Fruit Products Co.*, 238 U. S. 140, 142; 59 L. Ed. 1238, 1239 (1914), the Court said:

> "The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here."

As evidence of this, the Cervieris in their appeal to the State Court and to this Court have appealed from only two of the three awards made. The highest award of $133,145 remains unattacked.

If the procedure was unconstitutional as to the two lowest awards, why is it not unconstitutional with regard to the highest award? Appellants have complained of the unfairness of the treatment accorded them in these proceedings. However, it appears that the identical treatment accorded them in the hearing on just compensation which resulted in a relatively high award was not unfair.

Appellants have not been deprived of any right, substantial or otherwise, protected by the Constitution. The cases have uniformly held that the Due Process and Equal Protection Clauses of the Federal Constitution only protect fundamental or substantial rights. *Brown* v. *New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119 (1899); *Twining* v. *New Jersey*, 211 U. S. 78, 106, 53 L. Ed. 97 (1908); *Dohany* v. *Rogers*, 281 U. S. 362, 369, 74 L. Ed. 904 (1930); *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569, 42 L. Ed. 853 (1898); *Washington National Insurance Co.* v. *Board of Review*, 1 N. J. 545, 552 (1949); *Marin Municipal Water District* v. *North Coast Water Co.*, 178 Cal. 308, 173 Pac. 469, 472 (Sup. Ct., Cal., 1918).

The degree of substantiality of rights protected by *both clauses* is the same. Thus, if a right is not protected by the Due Process Clause because it is unsubstantial it will

not be protected by the Equal Protection Clause. *U. S.* v. *Heinze*, 218 U. S. 532, 546, 54 L. Ed. 1139 (1910).

The fundamental or substantial rights to which a landowner is entitled in a condemnation proceeding are summarized in *Nichols on Eminent Domain, Volume I* (3rd Ed.) page 315 as follows:

(a) Notice and opportunity to be heard

(b) Before a competent tribunal

(c) In an orderly proceeding which is:

(1) Adapted to the nature of the case

(2) In accord with established rules which do not violate fundamental rights.

And of course the necessity that just compensation be awarded.

Among the many precedents which have stated the fundamental rights in condemnation cases to be as set forth above are *Dohany* v. *Rogers, supra* (p. 369); *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co., supra* (p. 569); *Seacombe* v. *Milwaukee & St. Paul Railway Co.*, 23 Wall. 108, 117, 23 L. Ed. 67 (1874); *Fish* v. *Morgenthau*, 10 F. Supp. 613, 616 (U. S. D. C. N. H. 1935); *United States* v. *McIntosh*, 2 F. Supp. 244, 251 (U. S. D. C. Va. 1932).

Closely related to the question of what are substantial or fundamental questions in condemnation actions is the question of the extent to which the state legislature may prescribe procedures in condemnation.

Under this Court's decision in *Seacombe* v. *Milwaukee & St. Paul Railway Co., supra* (p. 117) as well as under such state court decisions as *State* v. *Fisher*, 54 N. J. Super.

274, 281, 148 A.2d 735 (App. Div. 1959), and *Morris May Realty Corp. v. Board of Chosen Freeholders of the County of Monmouth*, 18 N.J. 269, 277, 113 A.2d 649 (Sup. Ct. 1955), state legislatures have the broadest powers consistent with the above stated requirements in prescribing procedures in eminent domain proceedings.

In *Seacombe* v. *Milwaukee & St. Paul Railway Co.*, *supra*, this Court said (p. 117):

> "It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature. *There is no limitation upon the power of the Legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.*" (Emphasis added.)

That the matter before this Court is procedural was admitted fifteen times by appellants in their briefs filed in the State Court and again in their Jurisdictional Statement to this Court, page 5, line 10.

The sovereign nature of a condemnation proceeding justifies the legislature's latitude in prescribing the procedure therefor. *United States* v. *Jones*, 109 U.S. 513, 518, 27 L. Ed. 1015 (1883); *Abbott* v. *Beth Israel Cemetery Ass'n of Woodbridge*, 13 N.J. 528, 100 A. 2d 532 (Sup. Ct. 1953).

In the dissenting opinion in the State Court and in all the briefs filed by appellants in these proceedings, the sovereign nature of condemnation proceedings and the legislative prerogative to prescribe condemnation proce-

dures within the framework of the fundamental, substantive rights set forth above have been singularly ignored.

It follows that granting the procedural option to the Port Authority falls squarely within the Legislature's right to prescribe procedural rules and does not violate the substantive rights to which a landowner is entitled when his property is condemned.

The majority of the State Supreme Court emphasized (Jurisdictional Statement, page 8a, line 30) *that the appellants have not claimed that either procedure allowed by the option was unconstitutional, and that appellants have admitted there is no constitutional right to trial by jury in condemnation cases in New Jersey. Therefore, the majority of the court concluded that no fundamental or substantial right was invaded by the procedural option and N. J. S. A. 32:1-132 is perfectly valid. The same reasoning obviously applies to a discussion for the purposes of this Court's jurisdiction of the substantiality of any right allegedly denied.*

Thus, appellants, in the light of the above, in effect admit that they had notice and opportunity to be heard before a competent tribunal in a proceeding which afforded them adequate means to have the just compensation to which they are entitled determined and that they have in fact received just compensation for their property. Nevertheless, appellants insist that some fundamental right has been denied to them.

This elusive right allegedly denied appellants remains undefined after the filing of numerous briefs and oral argument in the State Courts. *No showing has been made of*

prejudice to the appellants, substantial or otherwise, resulting from the Port Authority's exercise of its option.

On the other hand, as the majority of the State Supreme Court has noted (Jurisdictional Statement, page 15a, line 24), there are many instances in which state agencies in the exercise of the sovereign power of eminent domain, have exercised similar authority to choose one of two or several constitutional procedures. The State Supreme Court observed (Jurisdictional Statement, page 13a, line 30) that though the words "at the option of" may have been omitted in the statutes concerned, the inclusion or exclusion of that phrase has no moment.

Additional cases in which the discretionary resort to optional procedures by administrative agencies has been sustained, in addition to those set forth by the majority in its opinion (Jurisdictional Statement, page 15a, lines 31, *et seq.*) are *Kohl* v. *United States*, 91 U. S. 367, 375, 23 L. Ed. 449 (1876) and *Vanneck Realty Corp.* v. *City of New York*, 259 App. Div. 461, 19 N. Y. S. 2d 544, *rehearing denied* 259 App. Div. 1001, 20 N. Y. S. 2d 984, *aff'd* 284 N. Y. 403, 31 N. E. 2d 505, *rehearing denied* 285 N. Y. 607, 33 N. E. 2d 542 (1st Department, 1940).

Countless procedural options exercisable by only one litigant in a court proceeding exist throughout the nation, the constitutionality of which, either from the standpoint of the equal protection clause or otherwise has never been doubted. For example, in New Jersey a plaintiff in an ordinary civil action not concerning real property, may select a forum. He may sue a defendant in a civil action in the County Court of the county in which the defendant resides or he may sue in the Superior Court, laying the

venue in the county in which the cause of action arose or in which any party to the action was resident at the time of the commencement of the action. Superior Court: N. J. Constitution, Art. VI, Sec. 3, Par. 2, R. R. 4:3-2; County Court: N. J. Constitution, Art. VI, Sec. 4, Pars. 1 and 5, R. R. 5:2-1.

New Jersey Rules of Practice 4:39-1 and 7:8-1 in effect provide that any party to a court proceeding may demand a jury trial in issues triable of right by a jury thereby resorting to a procedural option which in effect defeats the wishes of a party litigant who does not desire to have a trial by jury. (Of course, there is no right to trial by jury in New Jersey condemnations). A holding by this Court that the procedural option here afforded the Port Authority is unconstitutional would generate a never ending stream of litigation relative to the constitutionality of procedures similar to those above set forth with which the every day operations of courts throughout the country are concerned. The fact is that the moving party in almost all types of litigations has various procedural options which his adversary lacks. The adversary would only have a constitutional objection if he showed that the procedural option exercised was itself unconstitutional.

From the early Nineteenth Century to the present, it is a foreclosed question that property owners are not entitled to jury trials in New Jersey in condemnation proceedings. *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 724 (Ch. 1832); *Town of Montclair* v. *Stanoyevich*, 6 N. J. 479, 484, 79 A. 2d 288 (Sup. Ct. 1951).

Likewise this Court has early held that there is no Federal constitutional right to trial by jury in condemnation cases. *Kohl* v. *United States, supra* (p. 376).

To afford the procedural option to select one of two perfectly constitutional procedures, one of which provides for a jury trial on appeal, the status of a substantial and fundamental right, gives an incident of a jury trial a status that a jury trial itself does not enjoy in condemnation proceedings. *Peirson* v. *Boston El. Ry. Co.*, 191 Mass. 223, 77 N. E. 769, 772 (Sup. Jud. Ct. Mass. 1906).

In their Jurisdictional Statement, pages 11 and 12, appellants have criticized some of the cases relied on by the Port Authority and the majority of the State Court to sustain the classification employed by the New Jersey Legislature in granting the Port Authority the option in question.

Dohany v. *Rogers*, *supra*, specifically held that the fact that condemnation was being exercised on behalf of the State was in and of itself sufficient reason for the placing of the condemnor in a separate class. True the classification there was between the State Highway Commission and a private railroad. However, the important consideration is that the basis for the separate classification was that the condemnation was being carried out by the State Highway Commission. As in *Dohany*, noted by the majority opinion below (Jurisdictional Statement, page 18a, line 26) the appellee also is an important state agency justifying separate treatment.

Appellants also criticize the citation of *United States* v. *Burnison*, 339 U. S. 87, 94 L. Ed. 675 (1950), on the ground that the placing of a State in a separate class in that case was justified by reason of the State's close relationship with its residents and their property. As the Port Authority pointed out in its briefs in the State Court, what closer relationship can exist than that between the State and its agency exercising the sovereign power of eminent domain?

Appellants criticize the Port Authority's application of *Putman* v. *Ford*, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App., Va., 1930). They contend that the separate classification of the Tax Commissioner which gives him a procedural option to be re-heard in the trial court as a matter of right, without according the same right of rehearing to the property owners was justified by the court on the ground that the Tax Commissioner often only received constructive notice of the pending proceedings and therefore should have the option to have the case reheard as of right.

Appellants ignore the fact that among the bases for the court's sustaining such a procedure in *Putnam* was its finding that the option injured no one (p. 824).

Likewise the procedure exercised by the Port Authority in the instant case, has injured no one. In fact, appellants nowhere state what they consider their injuries to be.

In classes of cases which permit constructive notice, private litigants who do not receive actual notice are not entitled to be reheard as of right. Therefore, the only conclusion to be drawn from the *Putnam* case is that the State was preferred as to a procedural matter which harmed no one, because the State and taxpayers inherently "are in widely different classes".

United States v. *Heinze, supra*, is also criticized by appellants. This was a criminal case in which the United States had the option of interlocutory appeal, whereas the appellant did not. It was there held that Congress could properly classify the United States in matters of procedure. In other words, the United States was preferred procedurally and such preference was deemed justified as a

valid classification between litigants even in a criminal proceeding. A procedural option in a condemnation proceeding like the instant case would appear to be an *a fortiori* situation.

The quotation on page 12, line 4, of appellants' Jurisdictional Statement merely states the broad general rule in classification cases that "persons similarly circumstanced shall be treated alike."

The Port Authority does not take issue with this statement but maintains as it has throughout these proceedings that it and the property owners are not in similar circumstances and that the classification of the Port Authority separately as to a matter of procedure which does not result in prejudice to the landowner is entirely justified.

The quotation above referred to purportedly comes from the *Heinze* case. However, this quotation does not appear in that case. Apparently the *Putnam* case was appellants' source for the quotation but the quotation was there attributed to *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 776 (1930) not to the *Heinze* case. However, the legal principle of the *Heinze* case governs these appeals.

A materially incomplete quotation from 12 Am. Jur. 241, Section 543, appears on page 9 of appellants' Jurisdictional Statement to this Court.

The full quotation reads:

> "Generally. Generally speaking, equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also

would be applied to any other person in the state under similar circumstances and conditions.

"Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws. Thus, a statute which denies to the laboring man equal access to the courts denies the equal protection of the laws. Whatever may be his social and economic condition outside, when he enters the court, the law can permit no rule to fetter him in the prosecution of his claims or the preservation of his rights which does not apply equally to all others respecting the same kinds of claims and rights.

"*The Fourteenth Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation.* The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person, and hence does not forbid proper and

reasonable classifications in the field of court proceedings. This amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies, whether as between states or as between different sections of the same state. A provision in a state Constitution, however, to the effect that the legislature shall not pass any local or special law regulating the practice or jurisdiction of the courts is a specific limitation, and because of it the practice or jurisdiction as prescribed by statute cannot be different in the courts of such a state in any class of localities from what it is elsewhere in the state. The reason for the rule is that the right to redress of any wrong in the courts is a personal one unaffected by the place of residence." (Emphasis added.)

In addition to the above authorities, several reasons were in fact given by the majority of the State Court for the separate classification.

On page 19a, line 5 of the Jurisdictional Statement, the majority points out that "there are other realistically conceivable reasons for special treatment for the Authority in this field." These reasons dispose of appellants' argument that there is no basis or standard for the exercise of the Port Authority's option (Jurisdictional Statement, page 14, line 36). Among such reasons, the majority of the State Supreme Court noted that there would be times when complex problems of administration and valuation would be more ably met by the procedure in N. J. S. A. 32:1-35.15, et seq. as impliedly opposed to times when less complex valuation and administrative problems might very well be best met by resorting to Title 20. The majority noted that in the instant condemnation proceedings more than 40

tracts were the subject of acquisition. The properties acquired were of many different types and sizes with concurrent complex problems of valuation. The majority's consensus was that in such a situation "greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen." (Jurisdictional Statement, page 19a, line 26).

Also, the majority states "* * * the choice of locale for construction is limited to the Port vicinity at points on opposite sides of the River, making coordination necessary in the expropriation proceedings." (Jurisdictional Statement, page 19a, line 12).

The majority summed up its reasoning on classification (Jurisdictional Statement, page 19a, line 17) as follows:

> "'Accordingly, we believe sufficient factors are present to support the legislative judgment that the Authority should be classified sparately for eminent domain procedure purposes. More particularly, in the light of the whole problem, establishment of the alternative modes of proceeding and in giving the Authority the option of selecting the one to be followed cannot be regarded as being without any reasonable justification."

In addition, there is a historical basis for the retention of the option. N. J. S. A. 32:1-35.15 was an innovation in New Jersey condemnation procedure, and therefore it was considered advisable by the Legislature to retain the long established alternate procedure provided by Title 20.

As opposed to the many authorities and reasons cited in the majority opinion and herein in support of appellee's position, neither the State Court minority nor the appel-

lants have cited a single affirmative case holding that such a procedural option deprives them of any substantial or fundamental right.

Appellants have attempted to bring procedural rights generally within the purview of constitutional protection by citing *Bogni* v. *Perotti*, 224 Mass. 125, 122 N. E. 853 (Sup. Jud. Ct. Mass. 1916) and *Traux* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254 (1921). However, as the Port Authority pointed out in its briefs before the State Court, these cases dealt with early prohibitions of injunctions in labor disputes. Based on the findings of the respective appellate courts that injunctive relief protected the employer's right to conduct a business which was held to be a fundamental right protected by the Constitution, the legislation prohibiting the resort to such relief was condemned.

As emphasized many times in this memorandum and in prior briefs before the State Courts the sovereign nature of the proceedings and the lack of any prejudice, let alone substantial prejudice, to the property owner justifies the classification.

The entire question before this Court was summed up ably by the majority of the State Court when they said (Jurisdictional Statement, page 212, line 12):

> "* * * the clauses of the federal and state constitutions on which defendants rely do not prohibit a state from establishing different rules of procedure in eminent domain cases for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any property owner of substantial equality in the adjudication of his rights."

The Port Authority respectfully submits there is no substantial Federal question before this Court.

POINT II.

Appellants have not complied with Rule 15 (1) (d) and (e) relating to the substance of the Jurisdictional Statement.

The burden of establishing that this Court has jurisdiction is upon the appellants. *Zucht* v. *King*, 260 U. S. 174, 176-177; 67 L. Ed. 194, 198 (1922).

In *Sugerman* v. *U. S.*, 249 U. S. 182, 184, 63 L. Ed. 550, 551 (1918), Mr. Justice Brandeis speaking for the Court said:

> "* * * mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below."

Specifically, the Port Authority contends that the technical requirements of this affirmative burden were not fulfilled by appellants because they failed under Rule 15 (1) (d) to "specify the stage in the proceedings in the Court of first instance * * * at which, and the manner in which, the federal questions sought to be reviewed were raised: * * *"; and that pursuant to *Zucht* v. *King*, *supra*, they have failed completely, as we have shown above, to demonstrate that the Federal question here presented is substantial.

Rule 15 (1) (e) provides:

> "If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King*, 260 U. S. 174, 176, 177, 43 S. Ct. 24, 25), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b) (iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

These requirements are patently lacking on these appeals not only as a matter of substance but also because the Jurisdictional Statement which appellants submitted to this Court contained no attempt to comply with the specific requirements set forth in Rule 15 (1) (e). That appellants have assumed they possess a right to appeal to this Court irrespective of the substantiality of the federal question they raise is seen from the following statement in their Jurisdictional Statement (page 2, line 27):

> "It appears settled that a judgment of the highest court of a state against the contention of a party that a particular state statute violated the Fourteenth Amendment of the United States Constitution would entitle that party to an appeal as to the constitutional issue on its merits in accordance with said statutory provision."

Thus it is clear that appellants have ignored the requirement of this Court's rule that they show affirmatively the substantiality of the federal question which they wish this Court to review.

A mere reading of the two cases, *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 97 L. Ed. 120 (1952), and *Winters* v. *People of the State of New York*, 333 U. S. 507, 92 L. Ed. 840 (1947), relied on by appellants to sustain the substantiality of their alleged constitutional issue, have, in fact, nothing to do with the preliminary question of jurisdiction which must first be decided by the Court. Those cases deal with the merits of Fourteenth Amendment protections as applied to a State's denial of freedom of religion in the former case and freedom of the press in the latter.

Neither case deals with the preliminary determination of what is a substantial question to sustain this Court's jurisdiction.

Neither does the argument portion of the Jurisdictional Statement establish the substantiality of the question presented otherwise than by conclusion. No reasons are given.

Thus the technical requirements of Rule 15 relating to the content of the Jurisdictional Statement have not been met.

POINT III.

The question presented by these appeals was not timely or properly raised in the trial court and in consequence thereof has become moot.

Whether a federal question was sufficiently and properly raised in the State Court is itself a federal question, in the decision of which this Court is not concluded by the view taken by the highest court of the State. *Carter* v. *Texas*, 177 U. S. 442, 447; 44 L. Ed. 839 (1899); *Erie Railroad Co.*

v. *Purdy*, 185 U. S. 148, 152; 46 L. Ed. 847 (1902); *Davis* v. *Wechsler*, 263 U. S. 22, 24; 68 L. Ed. 143, 145 (1925); *Davis* v. *O'Hara*, 266 U. S. 314, 318; 69 L. Ed. 303 (1923). Certainly, this Court is interested in making certain that federal constitutional objections are not belatedly raised in the state courts.

As noted above, process in these proceedings specifically directed appellants to state their objections both to the title vesting provisions and to the just compensation procedure outlined in the complaint. In failing to make any such objections, appellants waived whatever rights they might have had to appeal from the trial court's order vesting title in the Port Authority.

A year-and-a-half later at the trial on the issue of just compensation, appellants raised for the first time their constitutional objection. The present appeals are thus from the condemnation awards. However, while appealing from the awards, appellants nowhere claim that the sums awarded them do not constitute just compensation for their property. Moreover, by not having made a timely objection to the order vesting title in the Port Authority, appellants have been forced to disclaim any attempt to have title revested in them. In other words, success for appellants would mean that the statute whose constitutionality they challenge would have to be judicially re-written to provide that the issue of just compensation could only be decided by a jury. This, of course, is directly contrary to the statute's clear and unambiguous terms.

The inescapable fact is that if the challenged option is stricken as unconstitutional, it will be impossible for this or any court to tell which of the two alternative procedures the New Jersey Legislature would have chosen. No court

possesses a warrant to make this type of legislative determination. In passing upon the validity of statutes, the judiciary cannot usurp the functions of the Legislature in deciding questions of policy—in our case determining which of two admittedly constitutional procedures the Legislature would desire to have the Port Authority employ in its condemnation proceedings for the George Washington Bridge.

Furthermore, what appellants are, in effect, asking this Court to hold is that they and not the Port Authority be given the option to determine which of the two alternative procedures should be employed for George Washington Bridge condemnation purposes. Assuming solely for the sake of argument, that appellants are correct in their equal protection argument and the option given the Port Authority is invalid, it follows that the same logic must, of necessity, invalidate an identical option in the appellants for the same reason.

In view of the above, it is clear that appellants, by failing to make a timely constitutional objection, have deprived themselves of any relief on these appeals which it is within the judicial power of this Court to grant. The constitutional question which appellants raise is therefore moot. Dispositive of this question is the recent statement by this Court in *Local No. 8-6 v. Missouri*, 361 U. S. 363, 4 L. Ed. 2d 373, 376 (1960):

> "Whatever the practice in the * * * [state court], the duty of this Court '*is to decide actual controversies by a judgment which can be carried into effect*, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (Emphasis added.)

Conclusion.

Appellee respectfully requests therefore that the appeals be dismissed for the reasons that appellants have not presented a substantial question for the decision of this Court; that they have not complied with Rule 15 of this Court by failing to show affirmatively that this Court should take jurisdiction; and that they did not raise the constitutional question timely in the trial court thereby rendering the question moot.

Respectfully submitted,

SIDNEY GOLDSTEIN,
General Counsel,
The Port of New York Authority,
Attorney for Appellee,
111 Eighth Avenue,
New York 11, N. Y.

On the Brief:

RUSSELL E. WATSON,
JOSEPH LESSER,
ROBERT S. TOBIN.

Dated: May 8, 1961.

APPENDIX.

Pertinent Statutes.

20:1-9. COMMISSIONERS; OATH; DUTIES.

The commissioners shall take and subscribe an oath faithfully and impartially to examine the matter in question and make a true report according to the best of their skill and understanding. Thereafter they shall meet at the time and place appointed and proceed to view and examine the land or other property and make a just and equitable appraisement of the value of the same, and an assessment of the amount to be paid by the plaintiff for the land or other property and damages as aforesaid, as of the date of the commencement of the action for condemnation.

20:1-16. APPEAL.

The plaintiff or owner of any of the land or other property, or any person interested may appeal from the report of the commissioners to the Superior Court, whether or not an appeal has been or may be given by the statute conferring the power to take land or property for public use.

20:1-20. JURY TRIAL ON APPEAL.

The appeal shall be tried by a jury upon the demand of any party to the appeal.

N. J. S. A. 32:1-35.9(c):

(c) Unless otherwise provided by law by the State in which such real property is located, the Port Authority shall not have power to acquire for air terminal purposes by condemnation or the right of eminent domain subsequent to June thirtieth, one thousand nine hundred and

fifty-two, any real property taken for and actually devoted to a public use; *provided,* that this limitation shall not apply to real property a proceeding for the acquisition of which was initiated prior to that date.

The foregoing limitations shall not be construed to limit, affect or impair the power of the Port Authority to acquire real property at any time and place for air terminal purposes by negotiation or in any other manner than by condemnation or the exercise of the right of eminent domain.

Subject to the foregoing limitations, if the Port Authority shall find it necessary or convenient to acquire any real property for air terminal purposes, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority, and such determination shall not be affected by the fact that such property has theretofore been taken for and is then devoted to a public use; but the public use in the hands or under the control of the Port Authority shall be deemed superior to the public use in the hands of any other person, association or corporation. The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple absolute or a lesser estate, by condemnation or the exercise of the right of eminent domain under and pursuant to the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jersey, Title 20:1-1 et seq., in the case of property situated in such State, or at the option of the Port Authority pursuant to such other and alternate procedure in each State as may be provided by law by such State. The Port Authority shall have such power of condemnation or eminent domain (not

only in respect to real property located within the Port of New York District but also as to any real property located outside of the Port District which is necessary, incidental or convenient for the effectuation, establishment, acquisition, construction, rehabilitation or improvement, and maintenance and operation of air terminals within the Port District. Nothing herein contained shall be construed to prevent the Port Authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary, or acquiring any such property by negotiation or purchase.

In the event the Port Authority shall deem that the use by it of any real property for any purpose hereunder will be necessary either immediately or by a definite future date, it may file with any petition in any condemnation proceeding brought pursuant to law or at any time thereafter a notice that it requires the possession thereof, either immediately or at a date specified in such notice. In such event, the Port Authority shall cause a duplicate of such notice and an affidavit of the filing thereof to be recorded in the office in which deeds are required to be recorded in the county wherein the land involved is situated and upon such recording the Port Authority may enter upon and shall be entitled to the possession, use and occupation of such real property at the time specified in said notice without suit or other judicial proceedings; *provided*, that it shall first deposit with the court a sum equal to the assessed valuation of such real property, or in the event that the assessed valuation thereof cannot be readily ascertained such sum as in the judgment of the Port Authority shall be sufficient as compensation for the real property acquired. The sum so deposited with the court shall be applied to the satisfaction of any award thereafter made in any condemnation proceeding. Such filing and recording of said notice shall be conclusive evidence of the entry upon and appropriation

of said property by the Port Authority, and title to said property shall vest in the Port Authority on the date specified in such notice.

N. J. S. A. 32:1-35.15(i):

(i) After all parties who have filed verified claims, as provided in sub-division (g) hereof, have proved their titles, or have failed to do so after being notified by the Port Authority of the time and place where such proof of title would be received, the Port Authority shall bring on before the Superior Court, as the court may direct, a hearing upon the claims so filed, or in case no claims are filed, to fix the amount to be paid for such lands.

The court shall determine without a jury, and with or without a view of the real property being acquired, the compensation which should justly be made by the Port Authority to the respective owners of such real property, and judgment shall be entered in the amount so determined.

N. J. S. A. 32:1-35.33:

32:1-35.33 CONDEMNATION PROCEEDINGS, ACQUISITION OF REAL PROPERTY BY.

If for the purposes of establishing marine terminals or purposes incidental thereto, including temporary construction purposes, the Port Authority shall find it necessary or convenient to acquire any real property as herein defined, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority.

The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple

absolute or a lesser estate, by condemnation or the exercise of the right of eminent domain under and pursuant to the Revised Statutes of New Jersey, Title 20:1-1 et seq., or at the option of the Port Authority as provided in section fifteen of chapter forty-three of the laws of one thousand nine hundred and forty-seven for the condemnation of real property for air terminal purposes, or pursuant to such other and alternate procedure as may be provided by law. Nothing herein contained shall be construed to prevent the Port Authority from bringing any action to remove a cloud on title or such other actions as it may, in its discretion, deem proper and necessary, or acquiring any such property by negotiation or purchase.

In the event the Port Authority shall deem that the use by it of any real property for any purpose hereunder will be necessary either immediately or by a definite future date, it may file with any complaint in any action for condemnation brought pursuant to law or at any time thereafter a notice that it requires the possession thereof, either immediately or at a date specified in such notice. In such event, the Port Authority shall cause a duplicate of such notice and an affidavit of the filing thereof to be recorded in the office in which deeds are required to be recorded in the county wherein the land involved is situated and upon such recording the Port Authority may enter upon and shall be entitled to the possession, use and occupation of such real property at the time specified in said notice without judicial proceedings: *provided*, that it shall first deposit with the court a sum equal to the assessed valuation of such real property, or in the event that the assessed valuation thereof cannot be readily ascertained such sum as in the judgment of the Port Authority shall be sufficient as compensation for the real property acquired. The sum so deposited with the court shall be applied to the satisfaction of any award thereafter made in any action for con-

demnation. Such filing and recording of said notice shall be conclusive evidence of the entry upon and appropriation of said property by the Port Authority, and title to said property shall vest in the Port Authority on the date specified in such notice. The power of the Port Authority to acquire real property by condemnation hereunder shall be a continuing power, and no exercise thereof shall be deemed to exhaust it.

Nothing herein contained shall be construed to permit the taking by the Port Authority of any property owned by any railroad or railway corporation, or by any other corporation, which is a "public utility" as defined in section 48:2-13 of the Revised Statutes, and devoted to use by such corporation in its operations, or acquired prior to the effective date of this act and held for such use, without the authority or consent of such corporation.